Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA,

Petitioner,

vs.

WAYNE THOMAS CARTER, AND
MELVIN JOHNS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether an invitee into a residence, whose sole purpose for being present is to assist the resident in an illegal activity, has a legitimate expectation of privacy while within the residence under the Fourth Amendment to the United States Constitution.

Whether a police officer's non-enhanced use of his natural senses to observe criminal activity in a residence from a public area outside the curtilage of the residence is a search under the Fourth Amendment to the United States Constitution.

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OPINIONS BELOW

The opinion of the Minnesota Supreme Court in *State v. Carter* (App., *infra*., pp. A1-A28) is reported in 569 N.W.2d 169 (Minn. 1997). The opinion of the Minnesota Supreme Court in *State v. Johns* (App., *infra*., pp. B1-B2) is reported in 569 N.W.2d 180 (Minn. 1997). The opinion of the Minnesota Court of Appeals in *State v. Carter* (App., *infra*, pp. C1-C8) is reported at 545 N.W.2d 695 (Minn. Ct. App. 1996). The opinion of the Minnesota Court of Appeals in *State v. Johns* (App., *infra*, pp. D1-D5) (No. C9-95-1765, 1996 WL 310305 (Minn. Ct. App. June 11, 1996)) is unpublished. The opinions of the District Court (App., *infra*, pp. E1-E7) are unreported.

JURISDICTION

The Minnesota Supreme Court filed its opinions in both cases on September 11, 1997. Under Rule 136.02 of Minnesota Rules of Civil Appellate Procedure entry of the judgments is automatically stayed for a period of 30 days. The Minnesota Supreme Court's judgment on respondent Carter was entered on September 29, 1997. Upon motion of respondent Johns, the Minnesota Supreme Court entered his judgment on October 1, 1997. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1257(a)(1997).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution:

> The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but

> upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution:

> [N]or shall any State deprive any person life, liberty, or property, without due process of law.

STATEMENT OF CASE

A. Statement of Facts.

On May 15, at approximately 8 p.m., Officer Jim Thielen of the Eagan Police Department, while working stationary radar patrol, was approached by an individual with information regarding illegal drug activity. The individual, whom the officer had never met before, told the officer that he/she had just walked by a nearby apartment window and observed people sitting around a table in the apartment "bagging" a white powdery substance. The individual also advised Officer Thielen that he/she believed the occupants of the apartment were using a blue four-door Cadillac with Illinois license plates which was parked in the apartment complex parking lot.

Upon receiving the above information Officer Thielen immediately went to the apartment complex. Officer Thielen approached the apartment which was on the lower level of the building. The officer, while standing on a common grassy area within 12 to 18 inches of the apartment window, was able to look through a gap in the window blinds which were closed. Upon doing so Officer Thielen observed two males and one female sitting at a kitchen table. The officer observed one of

the males place a white powdery substance onto the kitchen table. This person would then pass the substance to the second male who would place the powder in a plastic bag. The second male would in turn give the plastic bag to the female who would cut off the ends of the bag and put it on a pile on the table. Officer Thielen observed the operation for approximately 10 to 15 minutes during which time 5 or 6 bags were filled.

After making the above observations Officer Thielen left the apartment complex. While doing so he observed a blue Cadillac with Illinois plates in the parking lot. Upon returning to his original location he had a second conversation with the individual who had initially reported the illegal drug activity in the apartment. During this second conversation the individual advised the officer that he/she believed the occupants of the apartment also had a gun. Officer Thielen contacted Investigator Kevin Kallestad of the South Metro Drug Task Force and told him of the initial report and his subsequent observations. Investigator Kallestad advised Officer Thielen that he would attempt to obtain a search warrant for the apartment and the Cadillac. Investigator Kallestad instructed Officer Thielen to stop and secure the Cadillac should anyone attempt to drive away in it while he was attempting to obtain the search warrant.

At approximately 10:30 p.m., a police officer observed two males putting items into the above Cadillac. The two males got into the vehicle and drove away. Police officers stopped the vehicle a short distance away. Police identified the driver of the vehicle as respondent Carter. The passenger of the vehicle was identified as the respondent Johns. Police ordered both men out of the Cadillac. As police opened the passenger door to let Johns out they observed in plain view a black zipper pouch and a hand gun on the floor the vehicle. The gun was later determined to be loaded. Both Carter and Johns were placed under arrest and the Cadillac was towed to

a Eagan Police Department where it was eventually searched after officers obtained a search warrant for the vehicle and the apartment. While officers were executing the search warrant they found approximately 47 grams of cocaine in the black pouch, identification papers for Johns, pagers and a duffel bag containing a digital scale with trace amounts of cocaine.

Officers also executed the search warrant on the apartment. At the time the lessee of the apartment, Kimberly Thompson, was present. Officers found cocaine residue on the kitchen table and baggies similar to those found in the Cadillac. Officer Thielen was able to identify Carter, Johns and Thompson as the same individuals he had observed through the window bagging cocaine. Through subsequent identification officers were able to determine that both Carter and Johns were residents of Chicago, Illinois. In a statement to police Carter admitted that he owned a duffel bag in the Cadillac in which officers found the scale. Johns also provided police with a statement in which he admitted that he had agreed to transport cocaine from Chicago to Minnesota for money. Johns further admitted that he along with Carter and Thompson had been packaging the cocaine in Thompson's apartment before the police stopped them. Johns also acknowledged that he was aware that there was cocaine and a handgun in the Cadillac at the time they were stopped by police.

On May 17, 1994 the respondents were charged with the crimes of Conspiracy to Commit Controlled Substance Crime in the First Degree pursuant to Minnesota Statutes section 152.021, subd. 1(1); 609.05 (conspiracy to possess with the intent to sell 10 or more grams of a mixture containing cocaine) and Controlled Substance Crime in the First Degree Aiding and Abetting pursuant to Minnesota Statutes section 152.021, subd. 2(1); 609.05 (aiding and abetting another to possess 25 grams or more of a mixture containing cocaine.)

B. How the Federal Question Was Presented.

Both respondents made motions to the Trial Court to suppress their statements and all evidence seized from the vehicle and apartment. Respondents argued Officer Thielen's observations through Thompson's apartment window was an unreasonable search under the Fourth Amendment. Respondents went on to argue that because of the unconstitutional nature of Officer Thielen's actions any evidence derived from such observations should also be excluded.

The Trial Court determined that respondent's did not have standing under the Fourth Amendment to object to the Officer Thielen's observations into the apartment of Kimberly Thompson. The Trial Court concluded both respondents failed to present evidence of an expectation of privacy in the apartment based upon "understandings that are recognized and permitted by society." "Order Pursuant to Omnibus Hearing" quoting *Rakas V. Illinois*, 439 U.S. 128, 143-44 n.12, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978)(App., *infra*.,p E-8) In reaching its decision the Trial Court noted that the only evidence presented by the defense showed that the respondents were out-of-state residents who had been at the apartment for a period of time on May 15, 1994. The Trial Court also concluded that Officer Thielen made his observations from an area in which the respondents had no reasonable expectation of privacy. *Id.*, (App., *infra*., p.E-8 and E-12) The respondents preceded to trial on stipulated facts and were found guilty of both offenses.

Both respondents appealed their convictions to the Minnesota Court of Appeals challenging the lawfulness of Officer Thielen's observations through the apartment window. The appeals were reviewed by two separate panels of judges. In regard to respondent Carter, the Minnesota Court of Appeals held that Carter did not have standing to object to the

officer's observations as his claim that he was predominately a social guest is "inconsistent with the only evidence concerning his stay in the apartment, which indicates that he used it for a business purpose--to package drugs." *State v. Carter*, 545 N.W.2d 695, 698 (Minn. Ct. App. 1996)(App., *infra.*, p. C-6). In regard to Johns, a second judicial panel of the Minnesota Court of Appeals did not determine the issue of standing, holding that such a determination was unnecessary as under the totality of the circumstances because there existed sufficient probable cause to believe that criminal activity would be found and the officer's looking into the apartment window was part of a logical in the field investigative technique which the courts give deference because there existed sufficient probable cause to believe that criminal activity would be found. *State v. Johns*, unpublished, (App., *infra.*, pp. D-4 - D-5)

Respondents appealed the decisions of the Minnesota Court of Appeals regarding the lawfulness of Officer Thielen's observations to the Minnesota Supreme Court. The Minnesota Supreme Court, in a 4 to 3 decision, specifically held that under the Fourth Amendment of the United States Constitution and the related state constitutional provisions, both respondent's had standing to challenge the legality of Officer Thielen's observations.[1] The Court noted that

[1] When a state court decision appears to rest primarily on federal law and when the adequacy and independence of any possible state law is not clear from the face of the opinion a reliance on federal law is presumed absent a clear statement by the state court to the contrary. *Michigan v. Long*, 463 U.S. 1032, 1040-41, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983). The Minnesota Supreme Court has in the past adopted the practice of specifically stating in its opinion if the decision of the Court is to be based on independent state constitutional provisions. See, *State v. Scales*, 518 N.W.2d 587 (Minn. 1994)(requiring under the Minnesota Constitution that all custodial interrogations be electronically recorded) and *In re E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993)(rejecting the United States Supreme Court's opinion in *California v. Hodari*, 499

respondents had permission from the leaseholder to be in the apartment and remained in the apartment for two and one half hours performing a common task with the leaseholder. In it's decision the majority conceded that society does not recognize as valuable the task of packaging cocaine for distribution. However, the majority reasoned that because society does recognize as a valuable right the ability of residents to invite people into their homes to conduct a common task, be it legal or illegal, respondent's had a legitimate expectation of privacy in the apartment. The Court went on to conclude that Officer Thielen took extraordinary measures when he left the sidewalk, walked across the grass, stood approximately 12 to 18 inches from the window and looked between a gap in the window blinds. Thus Officer Thielen violated the respondents expectation of privacy in the apartment irrespective of whether or not he made his observations from an area outside the curtilage of the apartment. The Court also concluded that the Officer Thielen's warrantless observations were not supported by probable cause and reversed the decisions of the lower courts. *State v. Carter*, 569 N.W.2d 169, 178 (Minn. 1997)(App., *infra*, pp. A-1 - A-24) and *State v. Johns*, 569 N.W.2d 180 (Minn. 1997)(App., *infra*, pp. B-1 - B-2).

REASONS FOR GRANTING PETITION

I. IN CONCLUDING THAT A DEFENDANT HAS A LEGITIMATE EXPECTATION OF PRIVACY IN THE RESIDENCE OF A CO-CONSPIRATOR WHERE THE SOLE PURPOSE FOR BEING PRESENT IN THE RESIDENCE AT THE TIME OF A SEARCH IS TO ENGAGE IN ILLEGAL ACTIVITIES, THE MINNESOTA SUPREME

U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991) on state constitutional grounds)

COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW CONTRARY TO RELEVANT DECISIONS OF THE UNITED STATES SUPREME COURT.

Under the Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In the instant case the Minnesota Supreme Court has determined that a guest or invitee who is engaged a common task with one who has a possessory or proprietary right in a premises has a legitimate expectation of privacy protected by the Fourth Amendment irrespective of whether or not the common task is legal or illegal.

Evidence obtained in violation of the Fourth Amendment must be excluded at trial. *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), and *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). However, the Supreme Court has repeatedly noted that an unfettered application of the exclusionary rule is detrimental to our society and system of justice.

> The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of

> probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth. Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected.

Rakas v. Illinois, 439 U.S. 128, 137, 99 S.Ct. 421, 427, 58 L.Ed.2d 387 (1978) quoting *Alderman v. United States*, 394 U.S. 165, 174-175, 89 S.Ct. 961, 967, 22 L.Ed.2d 176 (1976). See also, *United States v. Ceccolini*, 435 U.S. 268, 275, 98 S.Ct. 1054, 1059, 55 L.Ed.2d 268 (1978); *Stone v. Powell*, 428 U.S. 465, 489-490, 96 S.Ct. 3037, 3050, 49 L.Ed.2d 1067 (1976); and *United States v. Calandra*, 414 U.S. 338, 348-352, 94 S.Ct. 613, 620-622, 38 L.Ed.2d 561 (1974). Mindful of "social costs" associated with the implementation of the exclusionary rule, the Supreme Court has rejected concepts such as "target standing" in cases where it can be shown that the search was directed at the defendant and "automatic standing" where a possession is an essential element of a crime. See respectively, *Rakas v. Illinois*, *supra*, 439 U.S. 128, 132-134, 99 S.Ct. 421, 424-427, 58 L.Ed.2d 387 (1978) and *United States v. Salvucci*, 448 U.S. 83, 94-94, 100 S.Ct. 2547, 2554, 65 L.Ed2d 619 (1980).

Since its landmark decision in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) the United States Supreme Court has consistently applied a two part analysis in determining if an individual has standing to object to an unreasonable search under the Fourth Amendment. The first is whether the defendant by his conduct has exhibited a subjective expectation of privacy. The second is whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable. *Smith v. Maryland*, 442 U.S. 735, 741-742, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979) quoting *Katz*, *supra*, 389 U.S. at 353, 88 S.Ct. at 512, 19 L.Ed.2d 576. See, *Rakas v. Illinois*, *supra*, 439 U.S. at 143-144 n.12, 99 S.Ct. at 430, 58 L.Ed.2d 387 (1978). The Court has also made it clear that its analysis is to be based upon an examination of all the facts and circumstances surrounding the defendant's particular standing claim. *Oliver v. United States*, *supra*, 466 U.S. at 170, 177, 104 S.Ct. 1735, 1740, 80 L.Ed.2d 214 (1984) and *United States v. Salvucci*, *supra*, 448 U.S. at 91-93, 100 S.Ct. at 2552-2553, 65 L.Ed.2d 619. The burden is upon the defendant to present sufficient evidence establishing his or her rights under the Fourth Amendment. *Jones v. United States*, 362 U.S. 257, 261, 80 S.Ct. 725, 731, 4 L.Ed.2d 697 (1960). See also, *Rawlings v. Kentucky*, 448 U.S. 98, 104, 100 S.Ct. 2556, 2561, 65 L.Ed.2d 633 (1980).

While it is clear that persons who live in or have other possessory interests in a residence may seek the protections of the Fourth Amendment, the ability of guests and other invitees to assert the same protections is less certain. As the United States Supreme Court has stated, "One's rights under the Fourth Amendment are personal rights that cannot be vicariously asserted." *Alderman v. United States*, 394 U.S. 165, 174, 89 S.Ct. 961, 966-967, 22 L.Ed.2d 176 (1969) citing *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967,

19 L.Ed.2d 1247 (1968) and *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960).

The United States Supreme Court first examined whether invitees or guests had standing to object to a search under the Fourth Amendment of another's premises in the case of *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960).[2] In *Jones* the majority concluded that a defendant who is a guest or invitee will always have standing to object to an unreasonable search and seizure under the Fourth Amendment if the same possession necessary to establish standing is an essential element of the offense or if the person is "legitimately on the premises" at the time of the search. *Id.*, 362 U.S. at 267, 80 S.Ct. at 734, 4 L.Ed.2d 697. The Court reasoned that to hold contrary would require a defendant in establishing a right under the Fourth Amendment to also acknowledge an essential element to the offense he was charged, i.e. possession of the premises or narcotics. The Court concluded that its decision was necessary to prevent the state from obtaining an "unfair advantage" of alleging the defendant unlawfully possessed the narcotics yet prohibiting the same defendant from challenging the search absent his making incriminating statements as to the essential element of possession. *Id.*, 362 U.S. at 263-263, 80 S.Ct. at 732, 4 L.Ed.2d 697.

The *Jones* Court's concern over the state's advantage of contradictory positions was diminished in the case of *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968).[3] Once again the Court pointed out that for the

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[2] In *Jones* the defendant was present at the time of the search, the apartment's tenant had been gone for approximately 5 days but had given defendant a key for the apartment and permission to use the apartment while he was away.

[3] In *Simmons* the defendant had been indicted for armed robbery and sought to challenge the search of a codefendant's mother's residence

defendant to assert standing to contest the search under the Fourth Amendment on a possessory crime he would in effect be forced to give up his Constitutional right against self incrimination. In the view of the majority such a position is "intolerable". To rectify the dilemma the Court went on to hold that when a defendant testifies in a motion to suppress evidence under the Fourth Amendment, his testimony may not be admitted against him at trial. *Id.*, 390 U.S. at 393-394, 88 S.Ct. at 976, 19 L.Ed.2d 1247. Therefore, the need for automatic standing when a defendant was charged with a possessory offense was no longer necessary. However, the Court reaffirmed its holding in *Jones* that a person will be deemed to have standing if it can be shown that he was "legitimately on the premises" when the search occurs. *Id.*, 390 U.S. at 390, 88 S.Ct. at 974, 19 L.Ed.2d 1247.

In *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) the Supreme Court examined the "legitimately on the premises" benchmark for establishing standing under the Fourth Amendment.[4] The Court concluded that the defendant lacked standing to object to the search under the Fourth Amendment as he failed to demonstrate a legitimate expectation of privacy in the area searched. *Id.*, 439 U.S. at 149, 99 S.Ct. at 433, 58 L.Ed.2d 387. In its majority opinion the Court commented that the "legitimately on the premises" standard established in *Jones*, *supra*, "creates too broad a gauge for measurement of Fourth Amendment rights."

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which resulted in the seizure of incriminating evidence. At the time of the search neither the defendant or his codefendant's were present in the residence.

[4] The facts in *Rakas* involved the search of an automobile. During the search incriminating evidence was found in the glove compartment and under the passenger seat. The defendant was a passenger in the vehicle and sought to challenge the search under the Fourth Amendment on the grounds that he was legitimately in the vehicle at the time of the search.

Id., 439 U.S. at 142, 99 S.Ct. at 429, 58 L.Ed.2d 387. In its opinion the Court noted that the "legitimate expectation of privacy in the invaded place" standard was a more appropriate benchmark in determining standing under the Fourth Amendment and consistent with previously established principles of the Court. *Rakas*, *supra*, 439 U.S. at 143, 99 S.Ct. at 430, 58 L.Ed.2d 387, citing *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), *United States v. White*, 410 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971) and *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).[5] Therefore, the Court minimized its holding in *Jones* to the "unremarkable fact" that a person may have a "sufficient interest" in another's residence which could warrant protection under the Fourth Amendment.[6] *Rakas*, 439 U.S. at 143, 99 S.Ct. at 430, 58 L.Ed.2d 387, citing *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

In *Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed. 85 (1990), the United States Supreme Court specifically

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[5] In response to the dissent's assertion that an abandonment of the *Jones* "legitimately on the premises" analysis would lead to a confusing and inconsistent application of the Fourth Amendment, the majority questioned whether a "bright line" existed under the former standard. As an example the majority asked whether under the legitimately on the premises test a casual visitor would also have an expectation of privacy over all rooms in the house or in an attached garage. The majority went on to cite numerous lower court decisions applying the legitimately on the premises standard resulting in inconsistent conclusions. *Rakas*, 439 U.S. at 142 n.13, 99 S.Ct. at 429-430, 58 L.Ed.2d 387.

[6] The majority opinion noted that *Jones* was the only occupant of the apartment at the time of the search, the owner of the apartment was a friend of Jones who had given him permission to use the apartment and a key to it, that Jones had personal clothing in the residence, that he had slept there "maybe a night" and had exclusive dominion and control over the residence. *Rakas*, 439 U.S. at 149, 99 S.Ct. at 433, 58 L.Ed.2d 387.

examined the ability of overnight guests and invitees to assert the Fourth Amendment in objecting to a search of a third party's premises when the overnight guest or invitee is present at the time of the search. Olson who was a suspect in an robbery/homicide was arrested in his girlfriends apartment had challenged the officer's ability to make a warrantless entry into the residence to effectuate the arrest. Although the defendant did not have a key to the premises nor any possessory or proprietary rights in the apartment, the Court determined that as an "overnight guest" of his girlfriend, the defendant had standing to assert the Fourth Amendment. In doing so the Court reasoned:

> To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share. Staying overnight in another's home is a long-standing social custom that serves functions recognized as valuable by society. We stay in others' homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town, when we are in between jobs or homes, or when we house-sit for a friend. We will all be guests many times in our lives. From either perspective, we think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home.

Id., 495 U.S. at 98, 110 S.Ct. at 1689, 109 L.Ed.2d 85.[7]

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[7] In response to the State's argument that Olson differed from the defendant in *Jones* as he could not control access to the residence, the

In attempting to apply the reasoning of *Jones*, *Rakas* and *Olson* relating to non-overnight guests and invitees, lower courts have taken into consideration a myriad of factors including: whether the defendant was present at the time of the search, how long had the defendant been at the residence prior to the search, why the defendant was present, who the defendant was visiting, for what purposes had the defendant visited the residence in the past, did the defendant have personal effects in the residence, whether the defendant was provided with unrestricted access to the premises, whether the defendant was a casual or regular visitor, whether the defendant had control of who could be admitted or excluded from the residence, and whether others without possessory or proprietary interests in the premises were present at the time of the search. See, 5 Wayne R. LaFave, *Search and Seizure*, §11.3(b), n.71 at 134-135 (3d ed. 1996).

It is the State's position in the instant case that the Minnesota Supreme Court has chosen to ignore United States Supreme Court precedent which places the burden upon the defendant to present sufficient evidence which under the totality of the circumstances society would recognize a legitimate or reasonable expectation of privacy over the area searched. In the instant case the Trial Court made the specific factual finding:

> No evidence was presented at the hearing that the defendant had lived at this apartment long term, was an overnight guest or was related to the leaseholder. The only evidence presented showed that the defendant was a resident of Chicago, Illinois

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Court rejected the ability to admit or exclude others as a sole determining factor in establishing standing under the Fourth Amendment. *Olson*, 495 U.S. at 99-100, 110 S.Ct. at 1689, 109 L.Ed.2d 85.

> and had been present at the apartment for a period of a few hours on May 15, 1994, during the police observations.

(*Memorandum in Support of Order Pursuant to Omnibus Hearing*, App., *infra*, p. E-8) One panel on the Minnesota Court of Appeals in affirming the factual finding of the trial court concluded:

> Carter's claim that he was predominately a social guest is inconsistent with the only evidence that he used it for a business purpose--to package drugs.

State v. Carter, 545 N.W.2d 695, 698 (Minn. Ct. App. 1996)(App., *infra*, p. C-6)[8] Even the Minnesota Supreme Court acknowledged:

> . . . it is undisputed that Carter failed to produce any evidence that he was a "guest" of Thompson's, let alone an overnight guest.

State v. Carter, 569 N.W.2d 169, 174-175 (Minn. 1997) (App., *infra*, p.p. A-14 – A-15). Yet the Minnesota Supreme Court uses the United States Supreme Court opinion in *Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 to uphold the defendants standing to object as his "subjective expectation" of privacy in the co-defendant's apartment is the type of expectation society is prepared to

[8] The Minnesota Court of Appeals in *Johns* deferred reaching a decision on the standing issue and affirmed the trial court on other grounds.

recognize as reasonable. *State v. Carter*, 569 N.W.2d 169, 175 (Minn. 1997)(App. *infra*, p. A-16).

The Fourth Amendment does not protect merely subjective expectations of privacy, but only those society is prepared to recognize as reasonable. *Oliver v. United States*, 466 U.S. 170, 177, 104 S.Ct. 1735, 1741, 80 L.Ed.2d 214 (1984). The failure of Minnesota's highest court to correctly apply the second prong of the United States Supreme Court's analysis of standing (i.e. is the subjective expectation of privacy one in which society will accept as reasonable) has led it to the baffling conclusion that society recognizes a persons right to engage in criminal activity in a residence provided they do so in concert with one who has a proprietary or possessor interest in the residence.

It would be a rare occasion in which a guest would be in a residence with the host and not engaged in a common act. As such, the Minnesota Supreme Court has reverted back to the "legitimately on the premises" standard specifically rejected under *Rakas* and *Olson*. To allow such a conclusion to stand as precedent would greatly expand the application of the exclusionary rule under the Fourth Amendment to the detriment of society's interests in seeking justice. Therefore the decision of the Minnesota Supreme Court must be reviewed.

II. IN CONCLUDING THAT A DEFENDANT HAS A LEGITIMATE EXPECTATION OF PRIVACY IN THE RESIDENCE OF A CO-CONSPIRATOR WHERE THE SOLE PURPOSE FOR BEING IN A RESIDENCE AT THE TIME OF THE SEARCH IS TO ENGAGE IN ILLEGAL ACTIVITIES, THE MINNESOTA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW NOT YET RULED UPON BY THE UNITED STATES SUPREME

COURT WHICH WILL CONTINUE TO FOSTER CONFLICTING DECISIONS IN OTHER STATE AND FEDERAL COURTS.

The Minnesota Supreme Court has determined that one who is lawfully in a residence for the sole purpose of engaging in illegal activities with one who has proprietary or possessory interest in the residence has standing to object to a search and seizure under the Fourth Amendment. Therefore, Minnesota's highest court has determined that an illegal joint venture with the tenant at the time of the search is and of itself sufficient to confer standing under the Fourth Amendment. Several federal courts and at least one other state supreme court have attempted to examine similar factual scenarios with conflicting results. [9] Review by the United States Supreme Court is necessary to resolve this conflict and to ensure that the Fourth Amendment is applied uniformly across the nation.

A. Federal And State Courts Which Have Found Standing Based Upon Defendant's Illegal Joint Venture With One Who Has Proprietary or Possessor Rights In The Area Searched.

In a recent decision, the Second Circuit Court of Appeals held a defendants presence at the time of the search and illegal joint venture with one who is in lawful possession of a premises creates a legitimate expectation of privacy under the Fourth Amendment. In *United States v. Fields*, 113 F.3d 313 (2nd Cir. 1997) after receiving a tip regarding illegal drug

[9] See, *United States v. Gerena*, 662 F.Supp. 1218, 1246-1247 (D.Conn. 1987) for a detailed examination of cases prior to 1987 in which federal and state courts have considered, with conflicting results, whether an illegal joint venture in and of itself is sufficient to create a legitimate expectation of privacy over an area controlled by participants in the illegal joint venture.

trafficking, officers approached a ground level apartment and officers looked into a window. Upon doing so Officers observed the defendant "bagging" crack cocaine. When officers entered the rear yard of the apartment building a man standing on the back porch yelled "5-0" which is a slang term for police. Officers believing they had been discovered made a warrantless entry into the residence to prevent the destruction of the cocaine and other evidentiary items. The defendant was subsequently arrested inside the residence. The Court of Appeals found that the defendant had a legitimate expectation of privacy under the Fourth Amendment despite defendant's illegal activity and that the defendant did not sleep or reside at the residence. The Court concluded the defendant had standing as he had a "significant connection to the residence as evidenced by the facts that he had a key to the residence, had paid the tenant $125 a month for use of the apartment to "cook and cut crack cocaine", had used the apartment for this purpose approximately 40 to 50 times and could admit "guests" with minor restrictions. *Id.* at 320-321. The Court went on the conclude that the defendant's "guest" who was present to assist in the illegal drug activity also had standing based solely upon the facts that he had been invited into the residence by the defendant and had been their for several hours. *Id.* at 321.[10]

The Ninth Circuit Court of Appeals has consistently held that a defendant who is present at the time of the search and enters into an illegal joint venture utilizing the area searched may challenge a search of the area under the Fourth

[10] The 2nd Circuit Court of Appeals consideration of illegal joint ventures as a basis to confer standing under the Fourth Amendment would appear contrary to its previous decision in *United States v. Pinto-Mejia*, 720 F.2d 248 (2nd Cir. 1983)(crew members of a fishing boat smuggling marijuana had no legitimate expectation of privacy over the boat's cargo hold or marijuana therein.

Amendment irrespective of the legality of the arrangement. In *United States v. Pollock*, 726 F.2d 1456 (9th Cir. 1984) law enforcement officers executed a search warrant on an operational methamphetamine laboratory seizing chemicals, glassware, documents evidencing the manufacture and distribution of drugs, several loaded weapons and silencers. The laboratory was set up in the residence of a co-defendant. When the search warrant was executed the defendant and other co-conspirators were present on the premises. The Ninth Court of Appeals determined that the defendant had standing to contest the legitimacy of the search warrant under the Fourth Amendment. The Court in reaching its conclusion noted that the defendant was legitimately on the premises, had entered into an arrangement with others indicating joint control and supervision of the premises. See also, *United States v. Quinn*, 751 F.2d 980 (9th Cir. 1984)(owner of boat who was involved in a joint venture to smuggle marijuana had standing to object to search of boat that was in possession of co-conspirators at time of search); *United States v. Johns*, 707 F.2d 1093, 1099-1100 (9th Cir. 1982), reversed on other grounds, 469 U.S. 478, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985)(airplane pilots who dropped off marijuana bales and then departed had standing to later search of a truck carrying the bales) and *United States v. Perez*, 689 F.2d 1336, 1338 (9th Cir. 1982)(defendants in a car who followed truck containing contraband had reasonable expectation of privacy in the truck).

At least one state court has concluded that an invitee conducting a joint venture with one who has possessory or proprietary rights has standing to object, albeit that the venture was illegal in nature. In *Commonwealth v. Govens*, 632 A.2d 1316 (Pa. Super. Ct. 1993) officers entered an apartment to arrest defendant who a few minutes earlier had sold cocaine from the apartment to an undercover officer. The Pennsylvania Court determined that despite the defendant's

status in the apartment being "unclear", because he was present at the time of the search, had been engaged in selling cocaine from the apartment and had apparent ability to exercise dominion and control over the apartment he had standing under the Fourth Amendment to object to the warrantless entry by police. *Id.* at 1319.

B. Federal and State Courts Which Have Rejected Standing Based Upon a Defendant's Illegal Joint Venture With One Who Has A Proprietary Or Possessory Interest in the Area Searched.

Contrary to the opinions above, several federal courts have rejected a defendant's claim of standing under the Fourth Amendment based solely upon the existence of an illegal joint venture with one who has a proprietary or possessory right in the area searched. In *United States v. Hicks*, 978 F.2d 722 (D.C. Cir. 1992) it was held that defendant did not have standing under the Fourth Amendment to object to the warrantless search of an apartment that he used to conduct illegal drug transactions. The Court reached this conclusion despite the fact that at the time of the search the defendant had been a "guest" of the tenant for several hours. The Court reasoned defendant ". . . was not engaged in any long standing social custom that serves functions recognized as valuable by society". *Id.* at 724 quoting *Minnesota v. Olson*, *supra*, 495 U.S. at 98, 110 S. Ct. at 1688, 109 L.Ed.2d 85. See also, *United States v. Harrison*, 103 F.3d 986 (D.C. Cir. 1997)(defendant had no standing to object to the search of a co-defendant's apartment as he was not a guest but merely used the premises to store drugs illegally).

In *United States v. Maddox*, 944 F.2d 1223 (6th Cir. 1991) the 6th Circuit Court took a similar position in holding that a drug conspiracy leader has no legitimate expectation of privacy in the residence of a third party even though the

residence was used as a crack house for the conspiracy and he was present at the time as a "party guest". *Maddox*, 944 F.2d at 1234. See also, *United States v. McNeal*, 955 F.2d 1067 (6th Cir. 1992)(defendant did not have an expectation of privacy in apartment believed to be occupied by a suspected drug dealer where only evidence presented was that he was an invitee of the tenant and had a key to the residence.)

The Eighth Circuit Court of Appeals has decided that one who is present in a residence of a co-conspirator for the purpose of distributing controlled substances does not have a reasonable expectation of privacy over the residence based solely upon his invitee status and the fact that he was engaged in an illegal joint venture with the resident. In *United States v. Wiley*, 847 F.2d 480 (8th Cir. 1988) the Court concluded that a defendant did not have a legitimate expectation of privacy in the residence of third person who was redistributing cocaine for him despite facts that defendant was present at the time of the search and had received at least one letter at the residence. See also, *United States v. Nabors,* 761 F.2d 465 (8th Cir. 1985)(defendant did not have a legitimate expectation of privacy in house of co-conspirator where drug transaction was to occur despite defendant's desire to keep transaction private)

The Eleventh Circuit Court of Appeals examined the defendant's standing to object to a warrantless search in the situation where the defendant was a party to an unlawful joint venture with one who had a proprietary or possessory interest in an area being used for drug transactions. *United States v. Garcia*, 741 F.2d 363 (11th Cir. 1984). The Court of Appeals held that a defendant did not have standing to object under the Fourth Amendment to the warrantless search of a co-conspirators apartment. The Court made such a determination despite defendant having used the residence on at least three occasions to discuss illegal drug transactions and telling an undercover officer to contact him by calling him at the residence. The Court also noted that the defendant was

present and in control of the residence at the time of the search. However, the Court reasoned that because defendant's contacts with the premises were by appointment only and that he did not store any personal belongings in the residence, his contacts were not personal enough to establish a reasonable expectation of privacy. See also, *United States v. Sarda-Villa*, 760 F.2d 1232 (11th Cir. 1985)(a captain and crew member did not have a legitimate expectation of privacy over hidden fuel tanks in a boat used to smuggle marijuana given the illegitimate use of the space)

Because lower federal and state courts have examined the issue of whether or not the existence of an unlawful joint venture with one who has proprietary or possessory interests in the area searched creates a legitimate expectation of privacy with conflicting results, review by the United States Supreme Court is necessary to resolve the issue and insure consistent application of the Fourth Amendment.

III. IN DECIDING THAT AN OFFICER'S NON-ENHANCED USE OF HIS NATURAL SENSES TO OBSERVE CRIMINAL ACTIVITY IN A RESIDENCE FROM A PUBLIC AREA OUTSIDE THE RESIDENCE MAY CONSTITUTE AN UNREASONABLE SEARCH THE MINNESOTA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW CONTRARY TO RELEVANT DECISIONS OF THE UNITED STATES SUPREME COURT.

In Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) it was decided that the use of listening devices and other artificial means to enhance one's natural senses may violate the defendant's legitimate expectation of privacy despite the interception or observation occurring in a

public place. However, the United States Supreme Court has noted: "What a person knowingly exposes to the public, even in his own home or office, is not subject of a Fourth Amendment protection." *Katz,* 389 U.S. at 351, 88 S.Ct. at 511, 19 L.Ed.2d 576. As one noted scholar has stated:

> Although it is generally true that a person has a justified expectation of privacy with respect to the interior of his place of residence, it does not follow that it is inevitably a search for a law enforcement officer to see or hear what is occurring therein. At least when the officer only employs his natural senses, the prevailing rule is that such uses of the senses made from a place where the officer has a right to be does not amount to a search in the constitutional sense.

1 Wayne R. LaFave, *Search and Seizure*, §2.3(c) at 480 (3rd ed. 1996). As a result the United States Supreme Court has consistently upheld non-enhanced observations from areas outside the curtilage of a residence when unusual measures were taken for the officer to obtain a location from which an observation can be made. *Florida v. Riley,* 488 U.S. 445, 449, 109 S.Ct. 693, 696, 102 L.Ed.2d 835 (1989)(officer's observation, with his naked eye, on interior of partially covered greenhouse in residential backyard from helicopter circling 400 feet above did not constitute a "search") and *California v. Ciraola,* 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986)(warrantless aerial observation, with naked eye, of fenced-in backyard within the curtilage of a home was not a search).

The United States Supreme Court holding that non-enhanced use of natural senses from common areas outside the

curtilage of a residence does not violate the Fourth Amendment has been repeatedly followed by lower courts as well. *United States v. Daoust*, 916 F.2d 757 (1st Cir. 1990)(police officers investigating illegal drug activity upon finding defendant's front door inaccessible walked up a 4 to 7 foot embankment at the rear of the residence. While in the back one of the officers looked through a kitchen window and observed a firearm in the residence. The officer's observations, while legitimately in the area at the time of the search, was not a search under the Fourth Amendment as officers may go to a person's home to interview him and if the front door is inaccessible, it is not unreasonable to go to the back of the house to check for a back door.); *United States v. Fields*, 113 F.3d 313 (2nd Cir. 1997)(search did not occur when officers looked into an apartment through a 5 to 6 inch opening in covered window and observed the defendants engaging in illegal drug activities. At the time the officers were standing in a fenced side yard which was a common area accessible to other tenants of the building.); *United States v. Taylor*, 90 F.3d 903 (4th Cir. 1996)(officers did not engage in a search when they looked into a residence through a dining room window and observed illegal drug activity. At the time of their observations the officers were standing a few feet from the front door of the residence normally accessible to the public,); *United States v. Jackson,* 588 F.2d 1046 (5th Cir. 1979)(federal narcotics agents investigating illegal drug activity at a motel did not conduct a search when they laid on the floor and pressed their ear to a 3/4 inch crack at the bottom of a door which connected the room to the suspects and overheard conversations regarding illegal drug activity as words were exposed to the "plain view" of others.); *United States v. Acevedo*, 627 F.2d 68 (7th Cir. 1980)(officers investigating heroin distribution situated in a "gangway" between the apartment building and a next door tavern did not conduct a search by "peering" into an apartment window to

observe a drug transaction.); *United States v. Anderson*, 552 F.2d 1296 (8th Cir. 1977)(Investigators did not conduct a search when walking to a back door of a residence. They looked in a side window and observed stolen property.); *United States v. Wheeler*, 641 F.2d 1321 (9th Cir. 1981)(Sheriff who was attempting to settle a civil dispute between two tenants of a duplex did not search when he "peered" through a one inch gap in a six foot privacy fence and climbed on top of several tires to look over a fence into the defendant's backyard as at the time of his observations the Sheriff was either standing on the adjacent tenant's property or on city property.); *State v. Taylor*, 401 N.E.2d 459 (Ohio Ct. App. 1978)(Officer standing on walkway accessible only to other tenants did not conduct a search when he looked into an apartment window to observe illegal drug activity.); *Commonwealth v. Hernley*, 263 A.2d 904 (Pa. Super. Ct. 1970)(Officer did not conduct a search under the Fourth Amendment despite standing on top of four foot ladder and using binoculars to look through a window as the ladder was located on another's property.); *State v. Clarke*, 242 So.2d 791 (Fla. Dist. Ct. App. 1970)(Officers observations into an apartment from a fire escape was not a search under the Fourth Amendment); *People v. Berutko*, 453 P.2d 721 (Cal. 1969)(Officer did not conduct a search when he looked into an apartment through a small aperture in a window covered by a curtain or drape to observe illegal drug activity); and *People v. Wright*, 242 N.E.2d 180 (Ill. 1968)(Officer standing on elevated train tracks 1 to 3 feet from apartment window did not conduct a search when he looked into the apartment through a crack in the curtains.)

In its opinion the Minnesota Supreme Court did not specifically decide whether the observations were from an area outside the apartment's curtilage. However, in its majority opinion the Court did comment: "It is at least arguable that Thielen's position just outside the apartment window was on a

common area and not the curtilage to Thompson's apartment." *State v. Carter*, 569 N.W.2d 169, 177, n. 10 (Minn. 1997)(App. *infra.*, p.A-20)[11] However, the Minnesota Supreme Court went on to add:

> The fundamental question under Katz is whether the looking intruded upon the justified expectation of privacy of the occupant. This, in turn, ordinarily requires consideration of two factors: (1) the location of the officer at the time of the viewing; and (2) the precise manner in which the view was achieved.

Id. at 177, quoting 1 Wayne R. LaFave, *Search and Seizure*, §2.3(d) at 495, 497 (2d ed. 1987). Focusing on the second prong of the above two part test the Court concluded that Officer Thielen took "extraordinary measures" when he walked off the sidewalk, across the grass, over some bushes, put his face within 12 to 18 inches of the window and looked through a small gap between the blinds. Because extraordinary measures were used the Minnesota Supreme Court determined that Officer Thielen's observations were a search under the Fourth Amendment. *Carter*, 569 N.W.2d at 178.(App. *infra.*, p. A-20).[12]

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[11] In addition to determining that the respondent's did not have an expectation of privacy in the apartment of their co-conspirator, the Trial Court also concluded that Officer's Thielen's observation into the apartment was not a search as it was made from an area outside the curtilage of the apartment in which the respondent's had no reasonable expectation of privacy. "Order Pursuant to Omnibus Hearing" (App., *infra.*, at p. E-12)

[12] Despite the near uniform finding of the federal courts that a search will not occur under the Fourth Amendment when an officer utilizes his natural senses to detect criminal activity from a public area, a few state courts have found to the contrary. *State v. Bowling*, 867 S.W.2d

Clearly the "extraordinary measures" taken by officer Thielen were minor in comparison to the actions of other officers in similar situations. Review by the United States Supreme Court is necessary to ensure that the Fourth Amendment and the opinions of the United States Supreme Court are interpreted and applied uniformly across the country.

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338 (Tenn. Crim. App. 1993)(It was a search under the Fourth Amendment when an officer standing on the driveway of a residence, laid on the ground to look under a partially opened garage door.); *State v. Jordan*, 631 P.2d 989 (Wash. Ct. App. 1981)(Officers responding to a loud party call at a duplex conducted a search when standing on the porch of the duplex they looked into the residence through a 6 inch crack between the casing of the window and a drape.); *State v. Kaaheena*, 575 P.2d 462 (Haw. 1978)(Officer standing on a crate located on a sidewalk next to a residence conducted a search under the Fourth Amendment when he looked into a window of the residence.); and *Olivera v. State*, 315 So.2d 487 (Fla. Dist. Ct. App. 1975)(police who left the sidewalk of an apartment building to an apartment window to observe and overhear conversations conducted a search under the Fourth Amendment.)

CONCLUSION

For the reasons discussed above, the State of Minnesota respectfully request that the United States Supreme Court grant the petition for writ of certiorari to review the judgment of the Minnesota Supreme Court in these cases.

Respectfully submitted,

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APPENDIX INDEX

Appendix A: Opinion and Judgment of the Minnesota Supreme Court: *State v. Carter* A-1

Appendix B: Opinion and Judgment of the Minnesota Supreme Court: *State v. Johns* B-1

Appendix C: Opinion and Judgment of the Minnesota Court of Appeals: *State v. Carter* C-1

Appendix D: Opinion and Judgment of the Minnesota Court of Appeals: *State v. Johns* D-1

Appendix E: Order Pursuant to Omnibus Hearing of the First Judicial District; *State v. Johns and State v. Carter* ... E-1

STATE of Minnesota, Respondent,

v.

Wayne Thomas CARTER, petitioner, Appellant.

No. CX-95-1368.

Supreme Court of Minnesota.

Sept. 11, 1997.

Following denial of his motion to suppress, defendant was convicted, in the District Court, Dakota County, Mary E. Pawlenty, J., of controlled substance offenses. Defendant appealed. The Court of Appeals, 545 N.W.2d 695, Davies, J., affirmed. Defendant again appealed. The Supreme Court, Tomljanovich, J., held that: (1) defendant had standing to assert unconstitutionality of search of premises not under his control; (2) officer's observations of interior of apartment constituted "search" for Fourth Amendment purposes whether or not made from apartment's curtilage; and (3) search was not reasonable.

Reversed.

Stringer, J., dissented with opinion in which Keith, C.J. and Blatz, J., joined.

1. Criminal Law 🔑 1139

Supreme Court reviews *de novo* district court's denial of motion to suppress, where facts of case are not in dispute.

2. Criminal Law 🔑 394.5(2)

Criminal defendant seeking to suppress evidence on basis that it was obtained in violation of Fourth Amendment must show that he or she is proper party to assert claim of illegality and to seek remedy of exclusion, and must demonstrate: that he or she has adversary interest in outcome; and that such adverse interest is based upon alleged violation of defendant's rights, rather than violation of rights of some third party. U.S.C.A. Const.Amend. 4.

3. Searches and Seizures 🔑 162

For purpose of ascertaining standing to challenge constitutionality of search, defendant must show possessory interest in items seized and expectation of privacy in areas searched. U.S.C.A. Const.Amend. 4.

4. Searches and Seizures 🔑 164

For purpose of ascertaining standing to challenge constitutionality of search. defendant against whom allegedly illegally obtained evidence is being offered qualifies as one who has adversary interest. U.S.C.A. Const.Amend. 4.

5. Searches and Seizures 🔑 162

Question of whether defendant challenging constitutionality of search is alleging adverse interest based upon his or her own rights or those of third party turns on determination of whether disputed search infringed interest of defendant which Fourth Amendment was designed to protect; such interest exists where person who claims constitutional protection has legitimate expectation of privacy in invaded place. U.S.C.A. Const.Amend. 4.

6. Searches and Seizures 🔑 162

For purpose of ascertaining standing to challenge constitutionality of search, defendant has "legitimate

expectation of privacy" in premises searched, as required to establish violation of his individual Fourth Amendment right, where his subjective expectation of privacy is one that society is prepared to recognize as reasonable; defendant must show both subjective expectation of privacy and that, under totality of circumstances, this expectation was reasonable in light of longstanding social customs that serve functions recognized as valuable by society. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

7. Searches and Seizures 🔑 164

Defendant observed by police, through gap in closed blinds of acquaintance's apartment, preparing cocaine for distribution, had standing to assert unconstitutionality of search; defendant's subjective expectation of privacy was evidenced by fact that he was observed inside apartment of acquaintance with doors shut and blinds drawn, and defendant was type of person who possessed legitimate expectation of privacy in apartment. U.S.C.A. Const.Amend. 4.

8. Searches and Seizures 🔑 162

For purpose of ascertaining standing to challenge constitutionality of search, legitimacy of defendant's expectation of privacy in prentises not under his control does not depend upon defendant's status as "guest" in any formal sense, but rather upon whether status actually enjoyed by defendant is type of longstanding social custom that serves functions recognized as valuable by society. U.S.C.A. Const.Amend. 4.

9. Searches and Seizures 🔑 164

Defendant had leaseholder's permission to be in apartment, worked in concert with leaseholder on common task of dividing and packaging cocaine, and remained in

apartment for at least two and a half hours had standing to challenge constitutionality of search. U.S.C.A. Const.Amend. 4; M.S.A. Const. Art. 1, § 10.

10. Searches and Seizures 🔑 162

For purpose of ascertaining whether particular defendant's possesses legitimate expectation of privacy in searched premises not under his control, society recognizes as valuable right of property owners or leaseholders to invite persons into privacy of their homes to conduct common task, be it legal or illegal activity. U.S.C.A. Const.Amend. 4.

11. Searches and Seizures 🔑 13.1

For constitutional purposes, "search" occurs whenever government agents intrude upon area in which person has reasonable expectation of privacy. U.S.C.A. Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

12. Searches and Seizures 🔑 17

Fact that police officer was arguably standing outside curtilage of multiple-unit dwelling at time he observed illegal activity occurring inside apartment was insufficient, without more, to establish that his observations were not "search" for Fourth Amendment purposes; focus of curtilage test was area observed rather than area in which officer was standing, and fact that officer was outside curtilage did not eliminate occupant's expectation of privacy within interior of apartment. U.S.C.A. Const.Amend. 4.

13. Searches and Seizures 🔑 17

Not all instances in which police officer looks into interior of house or apartment constitute "search" under Fourth Amendment; fundamental question is whether looking

intruded upon justified expectation of privacy of occupant, which in turn ordinarily requires consideration of location of officer at time of viewing and precise manner in which view was achieved. U.S.C.A. Const.Amend. 4.

14. Searches and Seizures 🔑 26

That which person knowingly exposes to public, even in his own home or office, is not subject to Fourth Amendment protection; Fourth Amendment does not protect activities easily observable by general public. U.S.C.A. Const.Amend. 4.

15. Searches and Seizures 🔑 17

For purpose of determining whether police officer's observations of interior of apartment constituted "search" for Fourth Amendment purposes, apartment leaseholder and others present in apartment did not knowingly expose their activities to public, where apartment blinds were drawn and officer had to take extraordinary measures to be able to observe activities within from outside. U.S.C.A. Const.Amend. 4.

16. Searches and Seizures 🔑 17

Police officer's observations of interior of apartment constituted "search" for Fourth Amendment purposes, whether or not officer was outside building's curtilage at time he made them; apartment leaseholder and others present in apartment did not knowingly expose their activities to public, and officer had to leave sidewalk, walk across grass, climb over bushes, crouch down and place his face 12 to 18 inches from the window to observe activities within. U.S.C.A. Const. Amend. 4.

17. Searches and Seizures 24, 40.1

For search to be reasonable under Fourth Amendment, police must have both probable cause and search warrant. U.S.C.A. Const.Amend. 4.

18. Arrest 63.4(1)
Searches and Seizures 44

Police may constitutionally make warrantless arrests, entries and searches of dwellings if they can demonstrate existence of probable cause and exigent circumstances. U.S.C.A. Const.Amend. 4.

19. Searches and Seizures 23

Conduct that would constitute illegal search does not become something less merely because police had reasonable suspicion and embarked on a search of limited intrusiveness; fact that officer reasonably expected to find evidence and used least intrusive means possible to achieve that end is insufficient to sustain warrantless search. U.S.C.A. Const.Amend. 4.

20. Drugs and Narcotics 185(2)

Search consisting of police officer's observations through blinds covering window of apartment was not "reasonable search" within meaning of Fourth Amendment, despite contention that officer had reasonable basis for believing occupants of apartment were engaged in drug activity and that search was minimally intrusive, where officer lacked either probable cause to obtain search warrant or warrant itself. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

Syllabus by the Court

1. A person who had permission from the leaseholder to be in an apartment, collaborated with the leaseholder on a common task while in the apartment, and remained in the apartment for 2 1/2 hours, had standing to challenge the legality of a search of that apartment under the Fourth Amendment to the United States Constitution, and Article I, Section 10 of the Minnesota Constitution.

2. It was a search when a police officer stepped off the sidewalk, walked across the grass, climbed behind some bushes, and looked into a ground floor apartment by peering through a gap in the closed window blinds from a distance of 12 to 18 inches.

3. Because the officer had neither probable cause nor a warrant, his search of the apartment was unreasonable.

Scott Swanson, Assistant State Public Defender, Minneapolis, for Appellant.

Hubert H. Humphrey III, Attorney General, St. Paul, James C. Backstrom, Dakota County Attorney by Phillip D. Prokopowicz, Assistant Dakota County Attorney, Hastings, for Respondent.

Heard, considered and decided by the court en banc.

OPINION

TOMLJANOVICH, Justice.

By looking through the gaps in the closed blinds covering a window, a police officer observed the appellant, Wayne Thomas Carter, as he engaged in a drug-packaging operation with two other persons, one of whom was the leaseholder of the apartment. The district court held that Carter, who was an

out-of-state visitor, did not present any evidence to establish his standing to contest the legality of the observation. The court also concluded that the officer did not conduct a search because he made the observations from an area where Carter did not have a reasonable expectation of privacy. The court of appeals affirmed the district court, but based its holding only on the finding that Carter did not have standing to bring a motion to suppress any evidence obtained from the officer's observations. We reverse, and hold that the evidence was sufficient to establish that Carter had standing to challenge the legality of the observation. We further hold that the officer's observation rose to the level of a search, and that the officer's lack of probable cause and a warrant rendered the search unreasonable under the Fourth Amendment of the United States Constitution, and Article I, Section 10 of the Minnesota Constitution.

At approximately 8 p.m. on the evening of May 15, 1994, an anonymous informant approached Eagan police officer Jim Thielen. The informant, whom Thielen never had seen before, told Thielen that he/she[1] had walked by apartment 103 at 3943 South Valley View Drive and observed people sitting around a table inside the apartment "bagging" a white powder. The informant also told Thielen that he/she believed the occupants of the apartment had used a blue four-door Cadillac located in the parking lot adjacent to the apartment complex. The informant also told Thielen that the car had an Illinois license plate that read SGD 896. In response to this information, Thielen went to the complex and approached the ground floor window of apartment 103. Thielen then walked toward the window of the apartment by leaving the common sidewalk that led to the apartment building's entrance and stepping on a

[1] Thielen testified at the omnibus hearing that he spoke with the confidential informant for 15 to 25 minutes. He gave no further detail, however, about what their conversation involved, stating that to do so would reveal the informant's identity.

grassy common area closer to the window. Thielen then walked behind some short bushes located in front of the apartment window and stood approximately 12 to 18 inches from the window. The windows blinds were drawn closed, but gaps in the blinds allowed Thielen to observe activity in the apartment. While looking through the gaps in the blinds, Thielen observed two males and one female sitting at a kitchen table. One of the males appeared to be placing a white powdery substance onto the kitchen table. This person then would pass the white substance to the second male who then would place the powder into a plastic bag. The second male, who was wearing bedroom slippers, would in turn give the plastic bag to the female who would cut off the ends of the bag and place it on the table.

After observing this activity for approximately 15 minutes, Thielen left the apartment complex and went to a nearby fire station where he had another conversation with the informant and another Eagan police officer. At this time the informant told the officers that the people inside the apartment might be in possession of a gun. Thielen then returned to the apartment complex where he located a Cadillac matching the description given by the informant. He then returned to the fire station, telephoned Officer Kevin Kallestad of the South Metro Drug Task Force, and reported what he had seen. Kallestad instructed Thielen to stop and secure the suspect vehicle should anyone attempt to drive it away. Police also began to prepare affidavits as part of a request for warrants to search both the apartment and the Cadillac.

At approximately 10:30 p.m., an Eagan police officer observed two males putting items into the suspect Cadillac. The two males then entered the vehicle and started to drive it out of the parking lot. As per instructions, Eagan police stopped the vehicle at the intersection of Rahn Road and Beau de Rue Drive. The police found Carter in the driver's seat and Melvin Johns in the passenger's seat. The police ordered both

men out of the car. As the police opened the door to let Johns out of the car, they observed a black zippered pouch and a handgun, later determined to be loaded, on the floor of the vehicle. The police then placed Carter and Johns under arrest. The police subsequently towed the Cadillac to the Eagan Police Department, and after receiving the signed search warrant at approximately 1:30 a.m. on May 16, the police searched the vehicle. When the officers opened the black zippered pouch, they discovered a white mixture in plastic baggies, Johns' identification, pagers, and a scale. Tests later determined that the white mixture was 47.1 grams of cocaine.

Late in the evening of May 15, after the arrests of Carter and Johns, Eagan police returned to apartment 103 and arrested its occupant, Kimberly Thompson.[2] At approximately 3 a.m. on May 16, police executed a search warrant on the apartment and located cocaine residue on the kitchen table and plastic baggies consistent with those found in the automobile driven by Carter. Thielen subsequently identified Carter, Johns and Thompson as the individuals he had observed in the apartment packaging the white mixture. He identified Carter as the individual he had seen putting the white mixture on the table and dividing it into piles, Johns as the man who wore slippers and placed the piles into baggies, and Thompson as the individual who cut the ends off the baggies and placed the baggies in piles. Police ultimately learned that Carter and Johns were residents of Chicago, Illinois, and that Thompson was the sole lessee of apartment 103. Subsequent to his arrest, Carter made a statement to the police in which he admitted ownership of a duffel bag found inside the Cadillac. A search of the duffel bag uncovered a digital gram scale containing traces and residue of cocaine. Johns made a statement to the police admitting he had accepted a proposal

[2] Thompson was a co-defendant in the omnibus hearing. She subsequently pled guilty and is not a party to this appeal.

to transport cocaine from Illinois to Minnesota for money, and that he, Carter and Thompson had packaged the cocaine at Thompson's apartment. He also admitted that there were approximately two ounces of crack cocaine and a handgun in the vehicle.

Carter, Johns and Thompson made motions through joint counsel to suppress their statements and all evidence seized from both the apartment and the Cadillac. They argued, among other things, that Thielen's initial observation through the window of Thompson's apartment was an unreasonable search under the Fourth Amendment and that all evidence obtained as a result of those observations should be excluded as fruit of the poisonous tree. After a two-day omnibus hearing, the district court denied the motions to suppress of Carter and Johns. The court held that the two defendants did not have standing to challenge Thielen's observations through Thompson's window because both defendants failed to present evidence that their expectations of privacy in the apartment were based upon "understandings that are recognized and permitted by society." *See Rakas v. Illinois,* 439 U.S. 128,143-44 n. 12, 99 S.Ct. 421, 430 n. 12, 58 L.Ed.2d 387 (1978); *see also Minnesota v. Olson,* 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990). In particular, the court noted that the only evidence presented by the defense showed that the two defendants were out-of-state residents who had been at the apartment for a period of time on May 15, 1994. The district court also concluded that Thielen's observation was not a search within the meaning of the Fourth Amendment because the officer made his observation from an area in which the defendants had no reasonable expectation of privacy.

Following the district court's denial of their motions to suppress, Carter and Johns proceeded with separate counsel. The district court tried Carter on stipulated facts and found him guilty of conspiracy to commit a controlled-substance crime in the first degree and aiding and abetting a controlled-

substance crime in the first degree. Minn. Stat. § 152.021, subd. 1(1), subd. 3(a) (1996); Minn. Stat. § 609.05 (1996). The district court denied Carter's request for a downward departure and sentenced him to 86 months. Carter appealed his conviction, challenging the legality of Thielen's observations through Thompson's apartment window. The court of appeals held that Carter did not have standing to object to Thielen's actions because Carter's claim that he was predominantly a social guest was "inconsistent with the only evidence concerning his stay in the apartment, which indicates that he used it for a business purpose–to package drugs." *State v. Carter*, 545 N.W2d 695, 698 (Minn.App.1996).

We therefore begin our analysis by addressing the question of standing, and only if we determine that Carter had standing to bring a motion to suppress evidence recovered as a result of Thielen's observation of the apartment, will we address the legality of Thielen's actions–whether his observation qualified as a search, and if it did, whether it was reasonable.

I. Standing

[1-5] Because the facts of this case are not in dispute, we will review de novo the district court's denial of Carter's motion to suppress. *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn.1992). Before a criminal defendant can bring a motion to suppress evidence on the basis that it was obtained in violation of the Fourth Amendment, the defendant must show that he or she is a proper party to assert the claim of illegality and to seek the remedy of exclusion. To establish such a showing, a party must demonstrate two things: First, that he or she has an adversary interest in the outcome. *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 702, 7 L.Ed.2d 663 (1962). And second, that the adverse interest is based upon an alleged violation of the rights of the individual, rather than the

violation of the rights of some third party. *Jones v. United States*; 362 U.S. 257, 261, 80 S.Ct. 725, 731, 4 L.Ed.2d 697 (1960)(overruled on other grounds).[3] As far as the first factor is concerned, a criminal defendant against whom the allegedly illegally obtained evidence is being offered surely qualifies as one who has an adversary interest. *See* 5 Wayne R. LaFave, *Search and Seizure* § 11.3, at 117 (3d ed.1996) (hereinafter LaFave). Consequently we hold that Carter had an adversarial interest in the outcome. The analysis of the second factor is not so easily decided, however. As the United States Supreme Court has told us, the question turns on a "determination of whether the disputed search * * * has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas*, 439 U.S. at 140, 99 S.Ct. at 429. Such an interest exists when "the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Id.* at 143, 99 S.Ct. at 430. The question before us, therefore, is whether Carter had a legitimate expectation of privacy in Thompson's apartment.[4]

[6] A defendant has a legitimate expectation of privacy when his or her subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable.'" *Id.* at 143-44 n. 12, 99 S.Ct. at 430 n. 12 (quoting *Katz v. United States*,

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[3] *Jones* was being interpreted as establishing "automatic standing" to challenge the legality of a search for any persons charged with crimes of possession. *United States v. Salvucci*, 448 U.S. 83, 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980). *Salvucci* overruled this holding to establish that the defendant must show a possessory interest in the items seized and an expectation of privacy in the areas searched to establish that he/she had standing to challenge the legality of a search. *Id.*

[4] The district court found that Carter had no expectation of the privacy in the area from which Thielen observed the illegal activity. As we will discuss *infra* in Section II, however, the proper question is whether Carter had an expectation of privacy in the area into which Thielen was looking–namely the inside of the apartment.

389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967)(Harlan, J., concurring)). In other words, a criminal defendant must make two showings to establish that he or she based the motion to suppress upon an alleged violation of his or her individual Fourth Amendment right. First, he or she must show a subjective expectation of privacy, and second, he or she must show that this expectation was reasonable in light of "longstanding social customs that serve functions recognized as valuable by society." *Olson*, 495 U.S. at 98, 110 S.Ct. at 1689.

[7] In the case at bar, it is clear that Carter had a subjective expectation of privacy. He was inside the apartment of an acquaintance with the doors shut and the blinds drawn. The more difficult question is whether Carter's expectation was legitimate, that is, whether the expectation was the type that society is prepared to recognize as reasonable. Both the district court and court of appeals concluded that Carter failed to establish that his subjective expectation was legitimate. The district court based its conclusion on the fact that Carter offered no evidence that his status in relation to the apartment was similar to the status of the defendant in Olson, or that his status was such that it provided a legitimate expectation of privacy in the apartment. Likewise, the court of appeals based its conclusion on the fact that Carter's claim that he was a social guest was inconsistent with the "only evidence concerning his stay in the apartment, which indicates that he used it for a business purpose * * * ." *Carter*, 545 N.W.2d at 698. In both cases, the courts focused on the facts of *Olson*, a case in which there was no dispute that the criminal defendant was an overnight guest of the person who had the possessory interest of the searched residence.[5] By comparison, it is

[5] The issue of whether a defendant has standing to assert a violation of the Fourth Amendment has a long and muddled history. Throughout the first half of this century, courts decided standing by using common-law concepts of private property. Courts generally found those

undisputed that Carter failed to produce any evidence that he was a "guest" of Thompson's, let alone an "overnight guest." But a closer reading of *Olson* reveals that the Supreme Court does not require a person to establish his or her status as either a guest or overnight guest before that person can prove a legitimate expectation of privacy in a location that is searched. Instead, the person must establish only that under the totality of the circumstances, the person's subjective expectation was the type of expectation that "society is prepared to recognize as 'reasonable.'"

[8] Admittedly, such a test is a difficult, one to define, let alone apply. But the Supreme Court's own words offer guidance. "To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations that we all share. Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society." *Olson*, 495 U.S. at 98, 110 S.Ct. at 1689. In other words, the Court in *Olson* did not recognize the expectation of privacy as legitimate merely because the criminal defendant was a *guest*. *See* 5 LaFave, *supra*, § 11.3(b), at 137 (stating that the Court's decision lends "considerable support to the claim that shorter

individuals who had an ownership interest, a leasehold, or "dominion and control" over the searched property to have standing to contest a search of the property. Courts, meanwhile, found that mere "guests" and "invitees" did not have such standing. *Jones*, 362 U.S. at 265-66, 80 S.Ct. at 733 (citations omitted). The Supreme Court rejected this property-based approach in favor of a broad rule that allowed "anyone legitimately on the premises where a search occurs" to challenge its legality by way of a motion to suppress. *Id.* at 267, 80 S.Ct. at 734. The Court later retreated from the "legitimately on the premises" test. *Rakas*, 439 U.S. at 128, 99 S.Ct. at 423. The Court in *Rakas* held that the mere fact that an individual was "legitimately on the premises" was insufficient to give that person standing to contest a search of another's dwelling place. *Id.* at 143, 99 S.Ct. at 430.

term guests also have standing").[6] Rather, it recognized the defendant's expectation of privacy as legitimate because the criminal defendant's status as a guest was the type of longstanding social custom that serves functions recognized as valuable by society. As the Court went on to state: "The point is that hosts will more likely than not respect the privacy interest of their guests, who are entitled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household." *Olson*, 495 U.S. at 99, 110 S.Ct. at 1689. Consequently, if Carter had established that his status is the type that serves functions recognized as valuable by society, his expectation of privacy would have been legitimate.

[9, 10] The stipulated facts show that the apartment's leaseholder allowed Carter and Johns into her apartment for the purpose of packaging cocaine in exchange for one-eighth ounce of cocaine; that Thielen observed all three persons inside the apartment as they collaborated to divide and package the cocaine; that Carter and Johns remained inside the

[6] Many other courts have concluded that *Olson* does not require a criminal defendant to prove his or her status as a guest to establish a legitimate expectation of privacy. *See, e.g., Hill v. United States*, 664 A.2d 347, 352 (D.C. 1995) ("To be sure, being an overnight guest is not the sole means by which one may claim an expectation of privacy in another's home.") (citations omitted); *Davis v. State*, 582 So.2d 61, 61 (Fla.Dist.Ct.App. 1991) ("*Olson* does not necessarily deny standing to one whose status in a residence is less than that of an overnight guest."); *State v. Wright*, 119 N.M. 559, 893 P.2d 455, 459 (N.M.Ct.App.1995) ("[W]e do not read *Olson* to make an individual's overnight status as a houseguest a precondition to the right to assert an invasion of a reasonable expectation of privacy under the Fourth Amendment to the United States Constitution."); *State v. Ackerman*, 499 N.W.2d 882, 884 (N.D.1993) ("[M]uch of the reasoning underlying the Supreme Court's finding of standing on the part of an overnight guest would support standing on the part of other guests, as well * * * .").

apartment for at least 2 1/2 hours, and that Johns was wearing bedroom slippers while inside the apartment.[7] Although we recognize that these facts probably fail to establish Carter as a "guest" of the apartment's leaseholder, we conclude that they were sufficient to prove that Carter was the type of person who possessed a legitimate expectation of privacy in the apartment. After all, Carter had the leaseholder's permission to be inside the apartment.[8] He remained inside the apartment for at least 2 1/2 hours, during which time he worked in concert with the leaseholder on a common task.[9] Whether

[7] Carter offered evidence of Johns' slippers to show that the two were so comfortable inside the apartment that they must have been guests. While recognizing the relevance of such a fact, we refuse to place a great deal of constitutional significance on a person's footwear. It is interesting to note, however, that another court recently found a lack of standing in part on the fact that one of the defendants "was feigning sleep while fully dressed and wearing *shoes*." *Hill v. United States*, 664 A.2d 347, 350 (D.C. 1995) (emphasis added).

[8] Although the fact that a person is legitimately on the premises is not by itself sufficient to establish standing, *Rakas*, 439 U.S. at 142, 99 S.Ct. at 429, it is important to note that a person who is not legitimately on the premises cannot have standing, 5 LaFave, *supra*, § 11.3(b), at 143. Courts also have concluded that "a showing that a person authorized to do so gave permission for the defendant to be present on that particular occasion" was sufficient to establish the fact that the defendant was legitimately on the premises. *Id.* at 144, 99 S.Ct. at 431

[9] Many courts have denied standing where it is apparent that the party alleging the illegal search was on the property very briefly or had only a minimal connection to the property or the host. *See, e.g., United States v. McNeal*, 955 F.2d 1067 (6th Cir.1992) (finding no legitimate expectation of privacy where defendant stated he had stopped by the host's home only to use the telephone); *Prophet v. United States*, 602 A.2d 1087 (D.C. 1992) (finding no standing where defendant had been at his friend's house for only 3 or 4 minutes prior to the police's entry); *Davis v. State*, 582 So.2d 61 (Fla.Dist.Ct.App.1991) (finding no legitimate expectation of privacy where defendant had been given permission to enter house by occupant's boyfriend, but occupant never had seen the defendant before and was shocked to find him in her

these facts establish Carter as a visitor, invitee or business partner does not matter. As the Court has carefully noted, arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like do not control. *Jones*, 362 U.S. At 266, 80 S.Ct. at 734. What does control, however, is the nature of the relationship between the property possessor and the person alleging the privacy interest in the property. If the relationship is the type that society recognizes as valuable, then we will find standing. If it is not, then we will not. Although society does not recognize as valuable the task of bagging cocaine, we conclude that society does recognize as valuable the right of property owners or leaseholders to invite persons into the privacy of their homes to conduct a common task, be it legal or illegal activity. We, therefore, hold that Carter had standing to bring his motion to suppress the evidence gathered as a result of Thielen's observations.

II. The Search

[11, 12] Having determined that Carter had standing to assert a violation of the Fourth Amendment, we now turn to the question of whether Thielen's observation constituted a search. A search occurs whenever government agents intrude upon an area where a person has a reasonable expectation of privacy. *California v. Ciraolo*, 476 U.S. 207, 211, 106 S.Ct. 1809, 1811, 90 L.Ed.2d 210 (1986) (citing *Katz*, 389 U.S. at 360, 88 S.Ct. at 516 (Harlan, J. concurring)). The state argues Thielen's observations did not rise to the level of a search because he was not inside the leaseholder's "curtilage"

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apartment); *State v. Wise*, 879 S.W.2d 494 (Mo. 1994) (finding no legitimate expectation of privacy where defendant merely had entered occupant's apartment to make a phone call); *State v. Baltimore*, 242 Neb. 562, 495 N.W.2d 921 (1993) (finding no standing where defendant had entered neighbor's house only to use the bathroom).

when he made his observation. As support for its argument, the state offers *State v. Krech*, 403 N.W.2d 634 (Minn.1987) for the proposition that the common grounds of multi-unit apartment complexes are not entitled to Fourth Amendment protection. In *Krech*, we stated:

> "it is a fair generalization that the lands adjoining a multiple-occupancy residence are less likely to receive Fourth Amendment protection than the yard of a single family residence" because "the privacy expectation as to such an area is often diminished because it is not subject to the exclusive control of one tenant and is utilized by tenants generally and the numerous visitors attracted to a multiple occupancy building."

403 N.W.2d at 637 (quoting 1 Wayne R. LaFave, *Search and Seizure* § 2.3(f), at 414 (2d ed.1987)). The state's argument misses the point of *Krech*, however.

[13] In developing the concept of "curtilage," the Supreme Court actually extended Fourth Amendment protection to those areas so intimately tied to the home itself that an individual reasonably could have expected persons to treat those areas as part of the home. *United States v. Dunn*, 480 U.S. 294, 300, 107 S.Ct. 1134, 1139, 94 L.Ed.2d 326 (1987). The curtilage cases, therefore, necessarily involve factual scenarios in which police search areas spatially removed from the home itself. *See, e.g., Dunn*, 480 U.S. at 297, 107 S.Ct. at 1137 (agents entered area surrounding barns, 50 feet from house); *Krech*, 403 N.W.2d at 637-38 (police entered yard of duplex where garbage cans were kept). The key question in a curtilage case is not where the police officer was standing when he made his observation, although police officers must establish that they had a legal right to be where they were at the time of the observation, rather it is the area that was observed. Although it is plausible that Thielen's

presence just outside the apartment window was legitimate,[10] the state cannot rely on Thielen's position alone to justify his subsequent observation into the apartment. The fact that a police officer was situated outside a residence's curtilage does not necessarily eliminate the occupant's expectation of privacy within the interior of the dwelling. 1 LaFave, *supra*, § 2.3(d), at 495-96.

> The fundamental question under *Katz is* whether the looking intruded upon the justified expectation of privacy of the occupant. This, in turn, ordinarily requires consideration of two factors: (1) the location of the officer at the time of the viewing; and (2) the precise manner in which the view was achieved.

Id at 497.

[14] This, of course, does not mean that all instances in which a police officer looks into a house or apartment will be a search under the Fourth Amendment. "What a person knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection." *Katz*, 389 U.S. at 351, 88 S.Ct. at 511. We, therefore, have held that police did not violate a homeowner's expectation of privacy by walking onto the homeowner's driveway and observing stolen property that was in plain sight from the driveway. *State v. Crea,* 305 Minn. 342, 346, 233 N.W.2d 736, 739 (1975). Other courts similarly have found no Fourth Amendment protection for activities that are easily observable by the general public.[11]

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[10] It is at least arguable that Thielen's position just outside the apartment window was on a common area and not the curtilage to Thompson's apartment.

[11] *See United States v. Acevedo,* 627 F.2d 68 (7th Cir.1980) (finding no search where police officer looked into an apartment window from a public gangway); *People v. Berutko,* 71 Cal.2d 84, 77 Cal.Rptr. 217, 453 P.2d 721 (1969) (finding no search where officers on defendant's front porch were able to see illegal activity through an

[15,16] People who close their doors and window blinds, however, do not knowingly expose their activities to the public. Consequently, we conclude that Carter, Johns, and Thompson took sufficient precautions to keep their activities private. It was only after Thielen left the sidewalk, walked across the grass, climbed over some bushes, crouched down and placed his face 12 to 18 inches from the window that their activities became observable. As one noted commentator has stated:

> [W]hen police surveillance takes place at a position which cannot be called a "public vantage point," i.e., when the police–though not trespassing on the defendant's curtilage–resort to the extraordinary step of positioning themselves where neither neighbors nor the general public would be expected to be, the observation or overhearing of what is occurring within a dwelling constitutes a Fourth Amendment search. This is really what *Katz* is all about.

1 LaFave, *supra*, § 2.3(d), at 482. Several courts have agreed that it is a search whenever police take extraordinary measures to enable themselves to view the inside of a private structure.[12]

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opening in window covering); *People v. Wright,* 41 Ill.2d 170, 242 N.E.2d 180 (1968) (finding no search where officer standing on transit authority right-of-way was able to see through a crack in the window curtain into defendant's apartment); *State v. Taylor,* 61 Ohio App.2d 209, 401 N.E.2d 459 (1978) (finding no search where officers looked into unshaded apartment window from public sidewalk).

[12] *See, e.g., Lorenzana v. Superior Court of Los Angeles County,* 9 Cal.3d 626, 108 Cal.Rptr. 585, 587, 511 P.2d 33, 35 (1973) (finding a search where police leave the driveway and peek through a two-inch gap in a drawn window shade); *Olivera v. State,* 315 So.2d 487, 491 (Fla.Dist.Ct.App.1975) (finding that police violated defendant's reasonable expectation of privacy by leaving the sidewalk and walking across grass outside apartment building to look into defendant's apartment window); *State v. Harris,* 919 S.W.2d 619, 623-24 (Tenn.Crim.App.1995) (stating that, while officers are free to position

The question before us, therefore, is whether Thielen took extraordinary measures to enable him to view the inside of the apartment. Although it is a close question whether Thielen's location at the time of his observation was legitimate, the totality of his acts makes such a determination unnecessary. For even if we concluded that the area just outside the apartment window was a common area, the fact that Thielen left the sidewalk, walked across the grass, climbed over the bushes, placed his face within 12 to 18 inches of the window and peered through a small gap between the blinds makes it clear that he took extraordinary measures to enable himself to view the inside of a private dwelling. If we conclude that his actions constituted anything other than a search, it is difficult to imagine when we would be able to say that any activity short of an actual physical intrusion of a dwelling would violate a person's expectation of privacy. We therefore hold that Thielen's conduct constituted a search under the Fourth Amendment.[13]

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themselves on a public sidewalk, once they walk around the building or attempt to gaze into a window, their activity becomes a search); *State v. Bowling*, 867 S.W.2d 338, 341-42 (Tenn.Crim.App.1993) (finding a search where an officer in a driveway got down on his hands and knees with his head almost touching the ground to look into a private garage).

[13] The state asserts that Thielen's actions were analogous to those we found to be constitutional in *State v. Buchwald*, 293 Minn. 74, 196 N.W.2d 445 (1972). In *Buchwald*, an officer investigating a report of a marijuana party taking place in several hotel rooms knocked on the defendant's door and, after the defendant opened the door in response, the officer observed several marijuana cigarettes in plain view inside the room. *Id.* at 447. We held that the police officer's actions did not constitute a search. *Id.* at 448. We based our conclusion, however, on the fact the defendant had consented to the officer's "entry" by opening the door:

> The observation into the defendant's open room by the police officer positioned outside the room was not an invasion of defendant's privacy, for the defendant himself opened the door

III. Reasonableness of the Search

[17-20] The Fourth Amendment protects persons from, among other things, unreasonable searches. U.S. const., amend. IV. In order for a search to be reasonable, the police must have both probable cause and a search warrant. *Id.*; *In re Welfare of G. (NMN) M.*, 560 N.W.2d 687,692 (Minn. 1997). In the case at bar, the state conceded that, prior to his observations through Thompson's window, Thielen did not have probable cause to obtain a search warrant. The facts also show that Thielen did not have a search warrant at the time of the observation. Despite these facts, the state now asserts that Thielen's search was reasonable because he had a reasonable basis for believing the occupants of Thompson's apartment were engaged in drug activity and because his search was minimally intrusive.[14] As the Supreme Court made clear in *Katz*, however, conduct that would constitute an illegal search does not become something less merely because the police had reasonable suspicion and embarked on a search of limited

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> voluntarily. He was not compelled to open it and the voluntariness of his doing so was not the less merely because the unknown knocker was a police officer.

Id. at 448. In this case it cannot be said that Carter in any way consented to Thielen's observations.

[14] The state also asserts that Thielen's warrantless search was reasonable because there were exigent circumstances. As we have stated in the past, police can make warrantless arrests, entries and searches of dwellings when they can demonstrate the existence of probable cause and exigent circumstances. *State v. Lohnes*, 344 N.W.2d 605, 610-11 (Minn.1984). Because the state admits that Thielen lacked probable cause, however, any reliance on this exception is misplaced.

intrusiveness.[15] As such, we once again reject the notion that a little bit of information justifies a little bit of a search.

Reversed.

STRINGER, Justice, dissenting.

While I agree with the court's conclusion that the police officer's actions in this case constituted an illegal search under the Fourth Amendment, I believe that Carter failed to show that he had a legitimate expectation of privacy in Thompson's apartment and I therefore dissent.

"The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." *Rakas v. Illinois*, 439 U.S. 128, 131 n. 1, 99 S.Ct. 421, 424 n. 1, 58 L.Ed.2d 387 (citations omitted). A challenge to a search must establish *ab initio* a legitimate expectation of privacy in the invaded place–that is, an expectation of privacy that "society is prepared to recognize as 'reasonable.'" *Id.* at 143-44, n. 12, 99 S.Ct. at 430, n. 12 (quoting *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (Harlan, J., concurring)).

The United States Supreme Court has acknowledged that the mere fact that a person is legitimately on the premises of another is insufficient to give that person standing to contest a search of the other person's premises. *Rakas*, 439 U.S. at 143, 99 S.Ct. at 430. Courts have found a legitimate expectation of privacy to exist where the defendant demonstrated a meaningful connection to the property or the host–for example, where the defendant was related to the host or had been given a key to the premises. *See, e.g., United States v. Haydel*, 649 F.2d 1152 (1981) (holding that defendant had legitimate expectation of privacy in his parent's home to which he had a key and unencumbered access); *Rose v. United States*, 629 A.2d 526 (D.C.App.1993) (holding that defendant had standing to challenge search of close relative's house to which he had a key and was a regular visitor). But standing has been denied where the party alleging an illegal search established no more than that they were a transient visitor to the property of another–where, for example, the defendant was present on the property only to use the telephone or bathroom,[1] was merely a party guest,[2] or otherwise failed to establish a connection to the property beyond simply being

[15] The State argues, and the court of appeals agreed, that Officer Thielen's actions were reasonable under *State v. Crea*, 305 Minn. 342, 233 N.W.2d 736 (1975). In *Crea*, after seeing a stolen snowmobile trailer in plain view outside the appellant's house, the police shined a flashlight into the garage and the basement window of the house and saw two stolen snowmobiles. *Id.* at 738. Without specifically invoking one of the exceptions to the warrant requirement recognized by the Supreme Court, we held that the officers had acted reasonably because: 1) after seeing the stolen snowmobile trailer in the driveway, they had "very strong" probable cause to believe the stolen snowmobiles were in the house; 2) "their intrusion, being visual and involving a basement window only, was minimal"; and 3) the late hour would have made obtaining a warrant difficult. *Id.* at 740. To the extent that *Crea* may be read as establishing that a warrantless search can be justified based on a general finding that it was "reasonable," it runs counter to the Supreme Court's holdings that the fact that an officer reasonably expected to find evidence and used the least intrusive means possible to achieve that end is insufficient to sustain a warrantless search. *See Katz*, 389 U.S. at 356, 88 S.Ct. at 514. Unlike here, the officers in *Crea* had "very strong" probable cause to suspect the stolen snowmobiles were inside the house. Crea, 233 N.W.2d at 740. It was not our intent in *Crea* to step back from the requirement of probable cause and exigent circumstances or to, in any other way, modify our analysis of warrantless searches under the Fourth Amendment.

[1] *See, e.g., United States v. McNeal*, 955 F.2d 1067 (6th Cir.1992) (holding no legitimate expectation of privacy where defendant stated that he had only stopped by the host's home to use the telephone); *State v. Wise*, 879 S.W.2d 494 (Mo. 1994) (holding no legitimate expectation of privacy where defendant had merely entered occupant's apartment to

present at the time of the search.[3] Furthermore, at. least one court has recognized that a defendant present at the time of a narcotics search and a member of a criminal venture does not have a reasonable expectation of privacy sufficient to challenge the unannounced police entry of the apartment of

make a phone call); *State v. Baltimore*, 242 Neb. 562, 495 N.W.2d 921 (1993) (holding that defendant who had only entered neighbor's house to use the bathroom did not have a legitimate expectation of privacy, despite the fact that defendant was occasionally given a key to the house for purpose of using the garden hose).

[2] *See, e.g., United States v. Maddox*, 944 F.2d 1223 (6th Cir.1991) (holding that defendant had no reasonable expectation of privacy where nothing in the record indicated that he was anything other than a transient party guest); *Lewis v. United States*, 594 A.2d 542 (D.C.App.1991) (holding that a mere party guest does not have a reasonable expectation of privacy in the host's home).

[3] *See, e.g., State v. Conklin*, 249 Neb. 727, 545 N.W.2d 101 (1996) (holding that defendant did not have standing to challenge search that occurred while he was in neighbor's apartment where he was only an occasional guest at the apartment, possessed no interest in the property and had no freedom to exclude anyone from the premises); *Hill v. United States*, 664 A.2d 347 (D.C.App.1995) (holding that, where there was no evidence that the defendants had a key to their friend's apartment, that they could admit or exclude others from the apartment, or establishing how much time they had spent in the apartment, they had failed to demonstrate a legitimate expectation of privacy); *Prophet v. United States*. 602 A.2d 1087 (D.C.App. 1992) (holding that defendant who had only been at his friend's house a few minutes before the police arrived did not have standing to challenge the entry); *People v. Rodriguez*, 69 N.Y.2d 159, 513 N.Y.S.2d 75, 505 N.E.2d 586 (1987) (holding that defendant found sleeping in the apartment of another had no standing where he was "a transient who had no indicia of legitimate or recognizable connection to the apartment where he was arrested or any relevant thing in that apartment"); *commonwealth v. Tann*, 500 Pa. 593, 459 A.2d 322 (1983) (holding no legitimate expectation of privacy in apartment where defendant was only occasional visitor to apartment, had no possessory or proprietary interest in it, and had been present for only 10-15 minutes prior to search).

another being used as a drug packaging operation. *See United States v. Lockett*, 919 F.2d 585 (9th Cir.1990).[4]

Here, Carter established nothing beyond the fact that he was present in Thompson's apartment for a period of 2 1/2 hours. He introduced no evidence that he had any prior relationship with Thompson, that he had ever been to her apartment before the night of his arrest, that he had personal effects in the apartment, that he had a key to the apartment, that he could invite or exclude others, or that he had any connection with the apartment other than his presence at the time of the search. The record is simply void as to any indicia that Carter was anything more than a brief, transient visitor. On these facts, it cannot be said that Carter met his burden of establishing a reasonable expectation of privacy in the apartment I would therefore hold that Carter did not have standing to challenge the search of the apartment and affirm the decision of the court of appeals.

[4] *Lockett* involved an allegation that the police, in entering an apartment that housed a drug packaging operation, did not comply with the federal "knock-and-announce" statute, 18 U.S.C. § 3109 (1988). However, the standard applied in determining whether the defendant had standing to challenge the entry was the same as that used to determine standing to challenge a search: whether the defendant had "a legitimate expectation of privacy in the property used by the joint venture." 919 F.2d at 588.

KEITH, Chief Justice (dissenting).

I join in the dissent of Justice Stringer.

BLATZ, Justice (dissenting).

I join in the dissent of Justice Stringer.

STATE of Minnesota, Respondent,

v.

Melvin JOHNS, Petitioner, Appellant.

No. C9-95-1765.

Supreme Court of Minnesota.

Sept. 11, 1997.

John M. Stuart, Minnesota State Public Defender by Bradford Colbert, Assistant State Public Defender, St. Paul, for Appellant.

Hubert H. Humphrey, III, Minnesota Attorney General, St. Paul, James C. Backstrom, Dakota County Attorney by Phillip D. Prokopowicz, Assistant Dakota County Attorney, Hastings, for Respondent.

Heard, considered and decided by the court en banc.

OPINION

TOMLJANOVICH, Justice.

The defendant, Melvin Johns, is a co-defendant of Wayne Thomas Carter. The facts **{missing}** legal issues are identical in both cases.

Based on our reasoning in the companion **{missing}** *of State v. Carter*, 569 N.W.2d 169, 178 **{missing}** (Minn.), the decision of the court of appeals is reversed.

STRINGER, Justice (dissenting).

For the reasons set forth in my dissent in *State v. Carter*, I respectfully dissent.

KEITH, Chief Justice (dissenting).

I join in the dissent of Justice STRINGER.

BLATZ, Justice (dissenting).

I join in the dissent of Justice STRINGER.

STATE OF MINNESOTA

IN COURT OF APPEALS

CX-95-1368

Dakota County — Davies, Judge

Dist. Ct. File K994985

State of Minnesota,

Respondent,

Hubert H. Humphrey III
Attorney General
1400 NCL Tower
445 Minnesota St.
St. Paul, MN 55101

James C. Backstrom
Dakota County Attorney
Phillip D. Prokopowicz
Assistant County Attorney
1560 W. Highway 55
Hastings, MN 55033

vs.

Wayne Thomas Carter,

Appellant.

John M. Stuart
State Public Defender
Scott G. Swanson
Assistant State Public Defender
2829 University Ave. S.E.
Suite 600
Minneapolis, MN 55414

Filed April 9, 1996
Office of Appellate Courts

SYLLABUS

1. A business caller, in contrast to a social guest, is without sufficient "presence" to have a reasonable expectation of privacy in an apartment and, as such, lacks standing to assert a claim of unlawful search.

2. The following do not require a downward sentencing departure: no criminal history; business and personal success; and downward departure recommendation from probation officer.

Affirmed.

Considered and decided by Parker, Presiding Judge, Schumacher, Judge, and Davies, Judge.

OPINION

DAVIES, Judge

Appellant Wayne Thomas Carter, who was arrested after a visual search through an apartment window, challenges the legality of the search. He also challenges imposition of the presumptive sentence. We affirm.

FACTS

On May 15, 1994, a citizen told Police Officer Jim Thielen (officer) that there was drug activity in a nearby apartment. This informant told the officer that, while walking past a garden-level apartment window, he saw people packaging a white powder in plastic bags. The informant also told the officer that there was a blue four-door Cadillac with Illinois license plates nearby that possibly belonged to the people in the apartment.

After talking to the informant, the officer proceeded to the apartment building and, while standing on the front lawn, approximately 12-18 inches from a garden-level window, looked through a gap in the window blinds. He saw three people--two males and a female--working at a kitchen table. The males were putting small amounts of white powder into plastic bags, which the female then cut off for sealing. The officer observed the three people for 15 minutes, during which time they filled five or six bags.

The officer then contacted a South Metro Drug Task Force officer, who applied for a search warrant for both the car and the apartment. The suspects' car left the premises and the police arrested its occupants before the search warrant was obtained. The officer recognized appellant Wayne Carter, the car's driver, and Melvin Johns, the car's passenger, as the two males he had seen in the apartment.

Police seized an automatic pistol (which was in plain view) from the passenger-side floor. When they later received and executed the search warrant for the car, the police recovered a black leather bag containing 47.1 grams of cocaine packaged in plastic bags, along with pagers and a scale.

Carter was found guilty, on stipulated facts, of conspiracy to commit a controlled substance crime in the first degree in violation of Minn. Stat. §§ 152.021, subd. 1(1), and 609.05 (1992) (count I), and controlled substance crime in the first degree (aiding and abetting) under Minn. Stat. §§ 152.021, subd. 2(1), and 609.05 (1992) (count II).

Carter was sentenced (only on count I) to the presumptive guidelines sentence of 86 months in prison. He now appeals, challenging the legality of the search and the failure to depart downward from the presumptive sentence.

ISSUES

I. Does Carter have standing to object to the officer's visual search?

II. Did the court err in failing to depart downward from the presumptive sentence?

ANALYSIS

I. Standing

As a threshold matter, the trial court ruled that Carter, as a short-duration caller, had no standing to object to the officer's peering into the apartment window. Carter disagrees and argues that his status, which he claims was as an "invited houseguest," is one to which society is willing to give an "expectation of privacy" and Fourth Amendment protection. On these stipulated facts, this presents a question of law, which we review de novo. ***Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n,*** 358 N.W.2d 639, 642 (Minn. 1984).

> [C]apacity to claim the protection of the Fourth Amendment depends * * * upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.

Rakas v. Illinois, 439 U.S. 128, 143, 99 S. Ct. 421, 430 (1978) (citing ***Katz v. United States,*** 389 U.S. 347, 353, 88 S. Ct. 507, 512 (1967)). A subjective expectation of privacy is legitimate if it is "one that society is prepared to recognize as 'reasonable.'" ***Katz,*** 389 U.S. at 361, 88 S. Ct. at 516 (Harlan, J., concurring).

As support for their respective conclusions, Carter and the state (as did the trial court) cite ***Minnesota v. Olson,*** 495 U.S. 91, 110 S. Ct. 1684 (1990). In ***Olson,*** the police made a warrantless, nonconsensual entry into a house and arrested Olson. ***Id.*** at 93-94, 110 S. Ct. at 1686-87. The United States Supreme Court, in affirming the Minnesota Supreme Court, held that ***Olson,*** as an overnight houseguest, had a reasonable expectation of privacy in the house protected by the Fourth Amendment. ***Id.*** at 96-97, 110 S. Ct. at 1688. Carter argues that the ***Olson*** holding applies to him.

The trial court stated that Carter presented no evidence--other than that he was an out-of-state resident--to show that his status created a reasonable expectation of privacy. We agree with the trial court's assessment.

Olson suggests that staying overnight in another's home is indicative of a sufficient "presence." Carter presents no evidence he was an overnight guest, and the suggestion that Carter may raise Fourth Amendment objections to a search of the premises solely because he was legitimately on the premises has been rejected as "too broad a gauge for measurement of Fourth Amendment rights." ***Rakas,*** 439 U.S. at 142, 99 S. Ct. at 429. The "legitimate expectation of privacy" standard requires a stronger presence than mere legitimate presence.

Overline v. State, Comm'r of Pub. Safety, 406 N.W.2d 23 (Minn. App. 1987), shows that an overnight stay is not necessarily required for standing. In ***Overline,*** an intoxicated man ran his truck off the highway into some trees, injuring his hand. ***Id.*** at 25. The man telephoned friends for a ride, they presumably complied, and shortly thereafter police entered the friends' home without a warrant and found the man. ***Id.*** This court held that the intoxicated man had a "legitimate expectation of privacy" in the home and therefore was entitled to raise a claim that the police violated his Fourth Amendment

rights by entering the home without a warrant. ***Id.*** at 27. No Fourth Amendment violation was found, however. ***Id.*** at 28.

Carter's presence here falls short of that in ***Overline,*** just as it falls short of ***Olson.*** Contrary to ***Overline,*** Carter's claim that he was predominantly a social guest in the apartment is inconsistent with the only evidence concerning his stay in the apartment, which indicates that he used it for a business purpose--to package drugs. This defeats the "legitimate expectation of privacy" standard, which requires "more than a subjective expectation of not being discovered." ***Rakas,*** 439 U.S. at 143 n.12, 99 S. Ct. 430 n.12. Carter's "presence" at the apartment was thus insufficient to give him standing. We affirm the trial court's conclusion that Carter lacks standing to object to the officer's observation of activities inside the apartment.

Having concluded that Carter lacks standing to object to the search, we do not reach his claim that the police search violated his Fourth Amendment right to be free from unreasonable searches.

II. Sentence

Carter claims that the court abused its discretion in sentencing him to the 86-month presumptive term. The supreme court has stated the applicable standard of review for a refusal to depart:

> [W]e do not intend entirely to close the door on appeals from refusals to depart [from the presumptive sentence]. However, we believe that it would be a rare case which would warrant reversal of the refusal to depart. * * * [T]he Guidelines state that when substantial and compelling circumstances are present,

> the judge "may" depart. This means that the ***trial court has broad discretion*** and that we generally will not interfere with the exercise of that discretion.

State v. Kindem, 313 N.W.2d 6, 7 (Minn. 1981) (emphasis added) (citation omitted). A sentencing judge may depart from the sentencing guidelines if "substantial grounds exist which tend to excuse or mitigate the offender's culpability, although not amounting to a defense." Minn. Sent. Guidelines II.D.2.a.(5).

Carter contends that three factors constitute "substantial grounds" tending to excuse or mitigate his culpability: (1) he has no criminal history; (2) he has succeeded at a number of endeavors (business and personal); and (3) the probation officer recommended a short prison term because he believed that Carter does not appear to be a risk to the community. We disagree that these grounds require departure.

Carter's lack of a prior criminal history is not a mitigating factor, but rather is considered in the sentencing guidelines grid. ***Cf. State v. Brusven***, 327 N.W.2d 591, 593 (Minn. 1982) (because criminal history is considered in determining presumptive sentence, "it generally would be unfair to consider [it] again" as support for departure). Nor are social factors, such as employment history or educational attainment, qualifying factors. Minn. Sent. Guidelines II.D.1.c., d. Finally, a downward departure recommendation in a pre-sentence investigation report is not a delineated factor justifying a departure, and even if it were, the existence of a mitigating factor does "not obligate the court" to grant a downward departure. **State *v. Wall,*** 343 N.W.2d 22, 25 (Minn. 1984).

We recognize "the growing body of evidence relating to '[t]he disparity of sentencing between people of color and whites.'" ***State v. Williams,*** 525 N.W.2d 538, 549 (Minn. 1994). However, the sentencing court's reasons for declining to depart dispositionally--including Carter's failure to

acknowledge the extent of his involvement in cocaine distribution and the amount of drugs confiscated--supports the court's refusal to depart. The court acted within its discretion.

DECISION

As a short-term business caller, appellant lacks standing to object to a search of the apartment. The court did not abuse its discretion in sentencing appellant to the presumptive term.

Affirmed.

/S/
Judge Jack Davies

April 2, 1996

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (1994).

STATE OF MINNESOTA
IN COURT OF APPEALS
C9-95-1765

State of Minnesota,
Respondent,

vs.

Melvin Johns,
Appellant.

Filed June 11, 1996
Affirmed
Kalitowski, Judge

Dakota County District Court
File No. K394982

Hubert H. Humphrey III, Attorney General, 1400 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101 (for Respondent)

James C. Backstrom, Dakota County Attorney, Phillip D. Prokopowicz, Assistant County Attorney, 1560 West Highway 55, Hastings, MN 55033 (for Respondent)

Bradford Colbert, Assistant State Public Defender, William Mitchell College of Law, 875 Summit Avenue, LEC 304, St. Paul, MN 55015 (for Appellant)

Considered and decided by Randall, Presiding Judge, Kalitowski, Judge, and Schultz, Judge.*

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant Melvin Johns challenges his convictions for first-degree controlled substance and conspiracy offenses based on: (1) the legality of the police officer's search; and (2) the district court's refusal to allow his public defender to argue lenity to the jury. We affirm.

D E C I S I O N

I.

On review, this court accepts a trial court's findings of fact on Fourth Amendment issues, unless clearly erroneous, and independently applies Fourth Amendment case law to the facts so found. ***State v. Saffeels,*** 484 N.W.2d 429, 430 (Minn. App. 1992) (citing ***State v. Storvick***, 428 N.W.2d 55, 58 n.1 (Minn. 1988)), ***review denied*** (Minn. June 1, 1992).

1. Standing

The Constitutions of both the United States and Minnesota protect citizens from unreasonable search and seizure. U.S. Const. amend. IV; Minn. Const. art. I, § 10. The initial inquiry in every search and seizure case is whether the defendant has standing to object to the search or seizure.

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* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

State v. Sorenson, 441 N.W.2d 455, 457 (Minn. 1989). Standing exists when the person challenging the search has a reasonable expectation of privacy in the area searched. ***Rakas v. Illinois,*** 439 U.S. 128, 143, 99 S. Ct. 421, 430 (1978); ***id.***

This court recently held Johns's co-conspirator lacked standing to challenge the officer's search because the motive for his presence in the apartment at issue was illegal business rather than social interaction. ***State v. Carter,*** 545 N.W.2d 695, 698 (Minn. App. 1996). Here, because we conclude Johns's Fourth Amendment claims fail on the merits, we do not determine whether Johns had standing to challenge the officer's search.

2. Fourth Amendment challenges

Assuming standing exists, Johns raises Fourth Amendment challenges based on invasion of the curtilage and the officer's visual search of the apartment.

The Fourth Amendment protects the home and its curtilage from unreasonable searches and seizures. ***Oliver v. United States,*** 466 U.S. 170, 180, 104 S. Ct. 1735, 1742 (1984). Police may, without a warrant, enter the areas of the curtilage impliedly open to use by the public. ***State v. Crea,*** 305 Minn. 342, 346, 233 N.W.2d 736, 739 (1975). In doing so, they are free to keep their eyes open and use their other senses. ***Id.*** Once police step off the area open to public use without a warrant, the test becomes whether the police acted reasonably. ***Id.*** at 346, 233 N.W.2d at 740. In determining the reasonableness of the officers' search, the reviewing court considers: (1) the intrusiveness of the search; (2) whether the officers had probable cause to believe evidence of criminal activity would be found; and (3) whether the officers would have difficulty obtaining a search warrant at that hour. ***Id.*** at 346-47, 233 N.W.2d at 740.

Here, a confidential informant told the officer he had just seen through a window of the apartment at issue three persons packaging drugs. To corroborate the informant's story, the officer walked to the apartment complex, stood 12 to 18 inches from the window and observed the three persons inside packaging drugs at the kitchen table for approximately 15 minutes.

We conclude the officer acted reasonably by walking up to the window and making the initial glance inside and by continuing to look in the window in an attempt to corroborate the informant's story. First, the supreme court has stated that the

> lands adjoining a multiple-occupancy residence are less likely to receive Fourth Amendment protection than the yard of a single-family residence because the privacy expectation as to such an area is often diminished because it is not subject to the exclusive control of one tenant and is utilized by tenants generally and the numerous visitors attracted to a multiple-occupancy building.

State v. Krech, 403 N.W.2d 634, 637 (Minn. 1987) (quoting 1 W. LaFave, Search and Seizure § 2.3(f) at 414 (1987)). Second, the officer's search was visual, never disturbing the persons inside the apartment and not requiring the officer to remove obstacles to see through the window. Third, because of the informant's detailed firsthand description of the drug activity, the search is entitled to greater weight under the totality of the circumstances test for determining probable cause. ***See Illinois v. Gates,*** 462 U.S. 213, 234, 103 S. Ct. 2317, 2330 (1983). Fourth, the officer sought search warrants immediately and procured such warrants in the middle of the night before physically searching the apartment. Accordingly, we conclude the visual search was part of a logical in-the-field

investigative technique, to which this court accords deference. ***See State v. Alayon,*** 459 N.W.2d 325, 330 (Minn. 1990). Because no Fourth Amendment violation occurred, the district court properly admitted the evidence against Johns.

II.

The supreme court has determined the jury in a criminal case has the power of lenity, that is, the power to acquit despite the law and the facts. ***State v. Perkins,*** 353 N.W.2d 557, 561 (Minn. 1984). A defendant does not, however, have the right to an instruction informing the jury of its power of lenity. ***Id.*** at 562. We conclude the district court did not err in refusing to allow defendant's counsel to argue lenity to the jury in opening argument when the court had already determined the legality of the officer's actions through the omnibus hearing. ***See id.*** (referring approvingly to ***United States v. Brown,*** 548 F.2d 204, 210 (7th Cir. 1977), which held the trial court may bar a defense attorney from arguing lenity to the jury).

Affirmed.

S/Thomas Kalitowski
6-5-96

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF DAKOTA FIRST JUDICIAL DISTRICT

State of Minnesota,

Plaintiff, ORDER PURSUANT TO OMNIBUS HEARING

vs.

Wayne Thomas Carter,

Defendant.

File No. K9-94-0985

This matter came on for omnibus hearing before the undersigned Judge of District Court on the 21st day of September, 1994, at the Dakota County Judicial Center, Hastings, Minnesota.

Phillip Prokopowicz, Assistant Dakota County Attorney, appeared on behalf of the State of Minnesota; Bruce Cowan, Esq. and David Holman, Esq., appeared on behalf of Defendant.

Based upon the files, records, and proceedings herein, the Court makes the following:

FINDINGS OF FACT

1. On May 15, 1994, Officer Thielen of the Eagan Police Department received information from an individual described as a "confidential informant" that suspected drug

activity was being conducted at 3943 South Valley View Drive, apartment 103 in Eagan, Minnesota.

2. The confidential informant informed Officer Thielen that he/she observed the drug activity as he/she walked by the apartment window.

3. The individual indicated that he/she observed people sitting in the apartment around a table which had white powder on it.

4. The individual further advised Officer Thielen that the people inside the apartment were "bagging" the white powder.

5. The individual also stated that he/she believed a vehicle, described as a blue four door Cadillac with Illinois plate number SGD-896, was being used by the occupants of apartment number 103.

6. In response to this information, Officer Thielen went to the apartment complex and approached the apartment window. The time was approximately 8:00 p.m.

7. To approach the apartment in question, Officer Thielen left the common sidewalk used to enter the apartment building and walked on a grassy common area to the window of the apartment.

8. Officer Thielen stood approximately 12 to 18 inches from the apartment window. The horizontal mini-blinds were drawn; however, gaps existed in the blinds through which Officer Thielen could see activity in the apartment.

9. While looking through the gaps in the blinds, Officer Thielen observed three individuals, two male and one female, sitting at a kitchen table.

10. One of the males appeared to be placing a white powdery substance onto the kitchen table. He then passed the white substance to the second male, who placed the powder into a plastic bag. The second male gave plastic bag to the female who cut off the ends of the bag and placed it on the table.

11. The officer observed this activity for approximately 15 minutes. He then left the apartment complex to phone Officer Kallestad of the South Metro Drug Task Force. After Officer Thielen's initial 15 minute observation, the apartment, its occupants and the apartment complex went unobserved by any officer for one and one-half hours.

12. Officer Thielen spoke to Officer Kallestad and reported his findings.

13. Based upon the conversation with Officer Thielen, Officer Kallestad proceeded to have search warrants prepared for the suspected apartment and a vehicle identified as a 1985 blue four door Cadillac, Illinois license plate number SGD-896.

14. At approximately 10:30 p.m. an Eagan police officer observed two male individuals putting items into the Cadillac identified by Officer Thielen's confidential informant.

15. When the vehicle attempted to leave the parking lot it was stopped by the Eagan Police Department.

16. The vehicle was detained and Defendant was identified as the driver and owner of the vehicle. Police told Defendant and his passenger to get out of the car. As the police opened the door to allow the passenger to get out of the car, the police saw a black zippered pouch and a handgun on the floor of the vehicle near the right front seat. The Defendant and the passenger were then placed under arrest.

17. The vehicle was then towed to the Eagan Police Department and impounded, but not searched at that time.

18. At approximately 1:30 a.m. on May 16, 1994, the officers executed a search warrant on the vehicle, and discovered approximately 40 grams of a white mixture, pagers, and a scale. The white mixture later tested positive for cocaine.

19. Both the State and Defendant stipulated that the only lessee of apartment number 103 was Kimberly Thompson.

20. Defendant is a resident of Chicago, Illinois.

21. No evidence was presented as to Defendant's status in the apartment other than he was viewed by Officer Thielen as being in the apartment for a period of a few hours on May 15, 1994.

22. The affiant who provided the application for the issuance of a search warrant and an affidavit in support thereof did not include material misstatements of fact as to invalidate the search warrant.

23. The affiant who provided the application for the issuance of a search warrant and an affidavit in support thereof did not deliberately or recklessly misrepresent any statements of fact as to invalidate the search warrant.

24. Subsequent to his arrest, Defendant was charged with two separate counts of controlled substance crime in the first degree.

CONCLUSIONS OF LAW

1. Defendant does not have standing to challenge whether Officer Thielen's initial observations into Kimberly Thompson's apartment on May 15, 1994 violated his rights under the United Stated Constitution or the Minnesota State Constitution.

2. Even if Defendant were found to have standing, the State of Minnesota has alleged sufficient facts to support a finding that observations made by Officer Thielen do not constitute an illegal search, in violation of the Fourth Amendment to the United States Constitution or Article I, Section 10 of the Minnesota Constitution.

3. As the registered owner of the vehicle in question, Defendant does have standing to challenge the validity of the stop and subsequent search of the vehicle.

4. Officer Thielen and the Eagan Police had an articulable and reasonable basis to stop Defendant's vehicle on May 15, 1994.

5. Officer Thielen and the Eagan Police had probable cause to seize the vehicle on May 15, 1994 when they observed a handgun and black zippered pouch.

6. The State of Minnesota has alleged sufficient facts to support a finding of probable cause to execute a search warrant for Defendant Carter's vehicle based upon Officer Thielen's initial observations through the apartment window. The search warrant executed by the police for Defendant's vehicle was valid as the affidavits the warrant relied upon established probable cause for the search and did not include false, material information that was recklessly submitted by the applicant for the search warrant.

ORDER

1. Defendant's motion to suppress all evidence obtained as a result of Officer Thielen's initial observations of apartment number 103 located at 3943 South Valley View Drive in Eagan, Minnesota on May 15, 1994 is hereby DENIED.

2. Defendant's motion to suppress all evidence obtained as a result of the search of Defendant's vehicle, a 1985 Cadillac, Illinois license plate number SGD-896,, on May 16, 1994, Defendant's vehicle is hereby DENIED.

3. A "not guilty" plea is entered on behalf of Defendant Carter.

4. The above-entitled matter is hereby set on for jury trial at 9:00 a.m. on Tuesday, January 17, 1995 at the Dakota County Judicial Center, Hastings, Minnesota.

5. The attached memorandum is incorporated in and made part of this Court's FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER.

Dated this 16th day of December, 1994.

BY THE COURT:

/S/
Robert F. Carolan
Judge of District Court

MEMORANDUM

Defendant challenges the search and seizure of the physical evidence involved in the instant case. His argument is three-fold: (1) The observation of Officer Thielen from the grounds adjacent to Kimberly Thompson's garden level apartment was an illegal search of said premises; (2) the subsequent stop of Defendant's vehicle was not valid; and (3) the affidavits relied upon for the execution of the search warrant for Defendant's vehicle was based on statements that were "recklessly false" and lacked sufficient probable cause.

I. STANDING

The Defendant was observed by Officer Thielen as an occupant of the apartment while he made his observations through the apartment window. No evidence was presented at the hearing that Defendant had lived at this apartment long term, was an overnight guest or was related to the leaseholder. The only evidence presented showed that Defendant was a resident of Chicago, Illinois and had been at the apartment for a period of a few hours on May 15, 1994, during the police observation.

"The Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." Rakas v. Illinois, 439 U.S. 128, 143, 99 S. Ct. 421, 430, 58 L.Ed.2d 387 (1978) (citations omitted). An expectation of privacy is "legitimate" if it is one that society is prepared to recognize as reasonable. Id. at 143-44, n.12 (citation omitted). Legitimacy, however, means more than a subjective expectation of not being discovered. Id.

In Minnesota v. Olson, 495 U.S. 91, 110 S. Ct. 1684, 109 L.Ed.2d 85 (1990), police suspected Olson of being the driver

of a car used in a robbery-murder. The day after the robbery-murder, police received a call from a woman living in a duplex that a man who claimed he was the driver of a vehicle used in a robbery was staying in the unit upstairs. The unit in which Olson was staying was leased to the caller's daughter. The police stayed away from the duplex until they were notified Olson was at the duplex. When officers approached the duplex unit and told Olson to come out, they heard a male voice say, "tell them I left." The officers then entered the unit, without consent, and arrested Olson.

The United States Supreme Court held that Olson, as an overnight guest, demonstrated that he had a sufficient enough connection with the duplex unit to be treated like a homeowner and that the arrest, therefore, was illegal. Olson, 495 U.S. at 100. The Court further held that as an overnight guest, Olson had a reasonable expectation of privacy and had standing to challenge his arrest since society recognizes this expectation as reasonable. Id. at 97. "Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society." Id. at 98.

No evidence was presented by Defendant that his status in Ms. Thompson's apartment was similar to Olson or that his status was one that was envisioned to be protected under the Olson rationale. The only evidence presented showed Defendant as an out of state resident who had been at the apartment for a period of time on May 15, 1994. Without more evidence the Court cannot conclude that Defendant's expectation of privacy in the apartment was based upon "understandings that are recognized and permitted by society," and therefore legitimate. As such, the Court determines that based upon the evidence presented Defendant does not have standing to challenge the search made by Officer Thielen into Kimberly Thompson's apartment.

II. OFFICER THIELEN'S INITIAL OBSERVATIONS THROUGH KIMBERLY THOMPSON'S WINDOW

Officer Thielen did not violate Defendant's constitutional right against unreasonable searches and seizures because the officer's observations were made from an area in which Defendant had no "reasonable expectation of privacy." The observations made by the officer were made from a common area opened to the public and other occupants of the apartment complex were limited to articles in plain sight.

Once Officer Thielen spoke to the anonymous individual who identified the apartment in question, he approached the apartment which was at garden level. A garden level apartment is one that a part of the apartment is below ground and if one looked though a window at full height that person would have to look downward to see the furniture of the apartment. While standing on the grounds outside the window of the apartment, the officer peered through the mini-blinds. The officer testified that there were gaps in the blinds which allowed him to view activity in the apartment. While looking downward and through the window, the officer observed Defendant and two other individuals bagging white powder. After observing this conduct for a period of time, he called his supervisor who proceeded to execute search warrants of the apartment and a vehicle identified by the anonymous individual as belonging to one of the apartment's occupants.

Unlike a single family dwelling, an apartment complex shares its sidewalks, grounds and corridors amongst all its residents. While the federal and state constitutions protect against unreasonable searches of one's home and surrounding curtilage, the Court must determine whether the ground the officer stood upon while observing the apartment is the kind envisioned to be within the curtilage of the apartment and therefore protected from unreasonable searches.

A four factor test has been used in Minnesota to determine whether an area claimed as curtilage and the extension of an individual's expectation of privacy to that area is protected. The four factors are: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of uses to which the area is put; and, (4) the steps taken by the residents to protect the area from observation by people passing by. State v. Krech, 403 N.W.2d 634, 636-37 (Minn. 1987).

When applying the factors to the instant case it becomes apparent that Defendant did not have an expectation of privacy from the location where Officer Thielen made his observations outside Ms. Thompson's window. First, while the proximity of the area to Ms. Thompson's window is quite close, the nature of the grounds as being common to all residents detracts from the closeness of the claimed curtilage area to Ms. Thompson's apartment. Ms. Thompson did not own the land immediately outside her window and could not claim any particular exclusive rights to said land. Second, the area is not within an enclosure surrounding the home. There is no fence blocking entrance to this spot from the public. There are no bushes or trees planted immediately in front of the window to create an enclosure type space that prevents the public from gaining entrance to the area. Third, the nature to which this area is put favors the position that this ground is not curtilage to her apartment. This area is a common area open to all residents of the apartment complex. Though the area is not a ball field, exhibits 8, 9, 15, 16 and 17 show that the public had access to the area directly in front of Ms. Thompson's windows to store bicycles. Residents obviously must leave the common sidewalk leading up to the building to deposit their bicycles and other items. Fourth, while Ms. Thompson did make an attempt to protect her apartment from

observation by drawing the blinds, no attempt was made to protect the area claimed as curtilage from passerby.

In support of his argument that the ground stood upon is protected as curtilage due to the fact that it was private ground in which no invitation was extended to the officer, Defendant relies upon Lorenza, et al. v. Superior Court, 9 Cal. 3d. 626, 511 P.2d 33, 108 Cal. Rptr. 585 (1973). In that case an officer approached a single family home and left the sidewalk approaching the home to look through a window that was not accessible through normal routes. The appellate court held that such an observation was unreasonable and violated the defendant's constitutional rights.

The Lorenza case is, however, distinguishable from the instant case. The instant case does not involve a single family home on private land. The apartment in this case was surrounded by property used by the entire apartment complex. Exhibits 8, 9, 15, 16 and 17 show a bicycle leaned up next to the apartment window of the apartment in question. Someone had to have left the sidewalk to put the bicycle there. There was also testimony that the complex housed families and it was common to see children and others leave the sidewalk areas and walk freely on the grassy areas of the complex. There does not appear to be any posted signs informing apartment residents or there guests to stay off the grass. And although bushes are planted at an angle off the sidewalk in front of one of the apartment's windows, there was no evidence presented that the bushes were planted for privacy reasons and not for aesthetic reasons.

Though Minnesota has no rule which deals with the specific facts of the instant case, the supreme court in State v. Buchwald, 196 N.W.2d 445 (Minn. 1972), acknowledged the reduced expectation of privacy over areas adjacent to motel rooms. "Granted that a [motel] tenant has standing to protect the room he occupies, there is nevertheless an element of public or shared property in motel surroundings that is entirely

lacking in the enjoyment of one's home." Id. at 448. Once it is determined that the area adjacent to an apartment window is not private but is common grounds for the entire complex, Buchwald would suggest that such an area would lose any constitutional protection. As the exhibits show, residents did walk upon and use the grassy area in front of Ms. Thompson's window. This evidence demonstrates that the area was common ground for the complex and therefore is not within the curtilage of the apartment Defendant occupied. As such, Defendant had no expectation of privacy in this area and the officer's observations did not constitute a search.

III. STOP OF DEFENDANT'S VEHICLE

After observing the incident inside the apartment, Officer Thielen called Officer Kallestad of the South Metro Drug Task Force for instructions. Officer Kallestad advised Officer Thielen to observe the individuals in the apartment and to stop the individuals if they attempted to leave the area. After a period of time, Officer Thielen and other Eagan police officers observed the Defendant and another male leaving the apartment with a black zippered bag. These two individuals got into the vehicle which was described earlier by the confidential informant and drove away. Eagan police subsequently stopped the vehicle, later identified as owned by Defendant, and told the two individuals to get out of the vehicle. Upon opening the passenger side door to allow the passenger to exit the vehicle, the police saw in plain view the black zippered bag and a handgun. Defendant and the other male were then placed under arrest. Defendant contends the stop of the vehicle was in violation of his constitutional rights.

In interpreting the state constitution the Minnesota Supreme Court in Matter of Welfare of E.D.J., 502 N.W.2d 779 (1993), held that when determining whether an investigatory "seizure" of the defendant occurred by the police

the test is if the court can determine objectively, on the basis of the totality of the circumstances whether a reasonable person having the defendant's perspective would have concluded he was not free to leave. E.D.J., 502 N.W.2d at 780. If a seizure is determined to have occurred by the court then the question becomes whether the police articulated a sufficient basis for suspecting the particular person stopped of criminal activity. Id. at 783. "The suspicion that the officer must be able to articulate must be more than an unarticulated 'hunch,' the officer must be able to point to something that objectively supports his position." State v. Johnson, 444 N.W.2d 824, 825-26 (Minn. 1989).

In the instant case, the actions by the police created the seizure of Defendant as they stopped the vehicle with flashing lights and approached the automobile slowly with guns drawn. Based upon the earlier observations of Officer Thielen as well as the vehicle description given to Officer Thielen by the anonymous person, the police have articulated a sufficient basis for the stop. Officer Thielen observed two individuals leaving the apartment building and identified them as the same two males in the apartment bagging white powder. The officer knew the vehicle had Illinois plates and could leave the area permanently. He testified that his training had also told him that automobiles are highly common in the transportation of narcotics. He could have reasonably concluded that these two individuals knew something about the activity involving the white powder in the apartment complex and possibly were in possession of some or all of this powder while in the vehicle. He could reasonably suspect that the white powder was contraband in view of how it was being handled in Ms. Thompson's apartment. He therefore formed an articulable basis to believe these two men were involved in criminal activity.

IV. STATEMENTS IN THE SUPPORTING AFFIDAVITS

Defendant contends that police officers recklessly included false statements in the supporting affidavits relied upon by the Hon. George Hoey who issued the search warrants in the instant case. Therefore he argues the evidence seized pursuant to the warrants should be excluded from evidence. The burden of proof in establishing the existence of false statements or misrepresentations is on the Defendant to override the "presumption of validity with respect to affidavit(s) supporting search warrant(s)' and demonstrate that the statement is false. Franks v. Delaware, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684, 57 L.Ed.2d 667, -- (1978). The determination has already been made that Defendant lacks standing to challenge of Officer Thielen's initial observations into Kimberly Thompson's apartment. Defendant, therefore, lacks the standing to challenge the issuance of the search warrant for Kimberly Thompson's apartment. He does have standing to challenge the search warrant that was issued for his vehicle.

In State v. Causey, 257 N.W.2d 288, 291 (Minn. 1977), the supreme court adopted a two-prong test to determine whether the particular statements used in an affidavit are of such a nature as to invalidate a search warrant: (1) whether the misstatement of fact in the affidavit is material to the determination of probable cause; and, (2) if the misstatement is material, it must be determined whether the police officer or other agent deliberately or recklessly misrepresented the fact. Causey, 257 N.W.2d at 292-93. Innocent misrepresentation, even though material to the determination of probable cause, is insufficient to invalidate a warrant. Id. at 291.

In the instant case, Defendant asserts that Officer Kallestad in his affidavit in support of the application for the issuance of search warrants misled the judge by implying that

an ongoing investigation occurred regarding drug activity in the apartment complex. Specifically, the affidavit states that "during May of 1994," Officer Thielen was contacted by a confidential informant regarding drug activities at the complex. See Exhibit 1. The burden is on Defendant to show this statement is deliberately false. No additional evidence was presented by Defendant other than the statement contradicts with the later statement in the affidavit describing Officer Thielen's observations occurring on May 15, 1994, thereby implying that an investigation was ongoing. Additionally, though the statement can be construed as misleading, the statement cannot be said to form the basis of probable cause for these search warrants. The material determination of probable cause is based upon Officer Thielen's observations of the apartment and not the statement that could appear to state that "an investigation was ongoing." Even if the Court were to determine the statement was misleading, it is not a material misstatement to the determination of probable cause because probable cause for the issuance of a warrant was established solely by Officer Thielen's own observations into the apartment and other information he received from his confidential informant. Defendant's argument fails the two-prong Causey test.

Defendant also cites the statement in Officer Kallestad's affidavit that the apartment was kept under constant surveillance after Officer Thielen's initial observations as deliberately false and misleading. Again, Defendant fails to meet his burden under the Causey test. Defendant fails to show by additional proof that Officer Kallestad's statement was deliberately misleading. Also, the statement was not determinative of being material in forming probable cause. Although Officer Thielen left the scene for 90 minutes to call Officer Kallestad, this statement is not material to forming probable cause. Officer Thielen's observations themselves are the material portion of the affidavit.

V. AFFIDAVITS AND ISSUE OF PROBABLE CAUSE

Defendant lastly contends that the search warrants were issued without sufficient probable cause and are therefore invalid.

The Fourth Amendment of the United States Constitution as well as article I section 10 of the Minnesota Constitution prohibits searches and seizures of people and places without probable cause. For a warrant to issue, a neutral magistrate or judge must find, within the warrant application and supporting affidavits, probable cause to believe that certain property was involved in a crime or possession of the property is a crime. See Minn. Stat. § 626.07. The test for probable cause is met if the affidavits, interpreted in a reasonable manner under the totality of the circumstances, sets forth competent evidence leading a reasonable, prudent person to believe that there is a basis for the search or articles sought are located in a certain area.

When a Court reviews the sufficiency of probable cause on a search warrant affidavit, a balance must be struck between an individual's Fourth Amendment right and the need for some leeway in law enforcement for society's protection. Brinegar v. U.S., 338 U.S. 160, 176, 69 S. Ct. 1302, 1311, -- L.Ed.2d -- (1949). In Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983), the Supreme Court created the standard of review in determining the sufficiency of search warrant affidavits: "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." Gates, 462 U.S. at 238, 103 S. Ct. at 2332. Among factors to consider by the Court are "type of crime, nature of items sought, extent of a suspects opportunity for concealment and normal inferences as to where suspects would keep items." State v. Pierce, 358

N.W.2d 672, 673 (Minn. 1984). When reviewing an issuance of a search warrant, the Court should give deference to the probable cause determination of the issuing judge and reverse only where no substantial basis for probable cause can be found. Massachusetts v. Upton, 466 U.S. 727, 104 S. Ct. 2085, 80 L.Ed.2d 721 (1984).

The supporting affidavits in the instant case is based upon sufficient facts to enable an independent judge to determine probable cause existed. This is done primarily through Officer Thielen's observations through the apartment window whereby he saw individuals bagging a white powder. Based upon his training and experience, he was able to conclude that such activity is consistent with drug packaging. Therefore, a review of the entire affidavit creates a "fair probability" that contraband or evidence of a crime will be found in a particular place.

R.F.C.